TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 411.

THE UNITED STATES, PLAINTIFF,

vs.

JAMES H. BRITTON AND BARTON BATES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 18, 1880.

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1 UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the circuit court of the United States in and for said district.

Be it remembered that on the 30th day of August, A. D. 1879, there was filed in the office of the clerk of the circuit court o the United States in and for the eastern district of Missouri a certain trahscript of record in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

IN CASE NO. 1478 OF THE UNITED STATES, plaintiff,
against
JAMES H. BRITTON AND BARTON BATES, defendants.

Be it remembered, that on the 20th day of January, A. D. 1879, the grand jury of the United States of America in and for the eastern district of Missouri returned into the district court of said United States in and for said eastern district an indictment in the above-entitled cause, which said indictment is in the words and figures following, to wit:

Indictment.

2 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States in and for said district, at the November term thereof, A. D. 1878.

The grand jurors of the United States of America, duly empaneled, sworn, and charged to enquire in and for the eastern district of Missouri, on their oaths present that on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, James H. Britton, of said district, being then and there and at the times hereinafter mentioned president of a certain national banking association, then and there known as the National Bank of the State of Missouri, in St. Louis, which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a nationel currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there, and at the times hereinafter mentioned, acting and carrying on a banking business under and by virtue of the said act of Congress and acts
3 amendatory thereto, in the city of St. Louis, within said district, and Barton Bates, being then and there and at the times hereinafter mentioned a director of said association, did conspire, combine, confederate and agree together among themselves, and with certain other pessons to the jurors aforesaid unknown, to willfully misapply, with inteut to defraud the said association and certain persons to the jurors aforesaid unknown, a large sum of money belonging to said association, to

wit, the sum of two million dollars by using and applying said sum to the purchas', in the name of the said James H. Britton, for the use of said association, from certain persons to the jurors aforesaid unknown, of a large number, to wit, twenty thousand shares of the capital stock of said association, which said purchase so to be made as aforesaid was not to be made in order to prevent loss on any debts theretofore or thereafter to be contracted with said association in good faith, and which said purchase so to be made as aforesaid was not to be made for the purpose of reducing the capital stock of said association in accordance with any vote theretofore had of shareholders owning two-thirds of the capital stock of said association.

4 And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the second day of April, in the year of our Lord on' thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, twenty-four hundred dollars, out of the money and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, forty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Francis Fisher.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid the said James H. Britton did afterwards, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, six thousand dollars, out of the

5 moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, one hundred certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Hugh Campbell.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, twelve hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, twenty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Isaac H. Loveland.

6 And the jurors aforesaid, on their oaths aforesaid, do further present that, in *and* pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors

aforesaid unknown a large sum of money, to wit, twenty-one hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person of a large number, to wit, thirty-five certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one J. W. Green, whose christian name is to said jurors unknown.

And the jurors aforesaid, on their oaths aforesaid, *on their oaths aforesaid*, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the second day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit,
7 eighteen hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, thirty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one R. B. Price, whose christian name is to said jurors unknown.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, fifteen hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, twenty-five certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one John Knapp.

8 And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, three thousand dollars, out of the money and funds then and there belonging to and the property of said association, in the purchase by him, the said John H. Britton, from said unknown person, of a large number, to wit, fifty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Russell Henckley.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the
9 jurors aforesaid unknown a large sum of money, to wit, eight thousand nine hundred and twenty-five dollars, out of the moneys

and funds then and there belonging to, and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, one hundred and fifty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Benjamin Stickney.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, forty-seven hundred and twenty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, eighty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Solomon A. Smith.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown, a large sum of money, to wit, three thousand and sixty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, fifty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one H. L. Lipscomb, whose christain name is to said jurors unknown.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, twenty-one thousand nine hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, three hundred and sixty-five certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Robert A. Barnes.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James N. Britton did afterwards, to wit, on the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, one hundred thousand dollars, out of the moneys and funds then and there belonging to and

12 the property of said association, in the purchase by him, the said James N. Britton, from said unknown person, of a large number, to wit, one thousand certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one John J. Roe, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

And the jurors aforesaid, on their oaths aforesaid, do further present that on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, said James H. Britton, late of said district, being then and there and at the times hereinafter mentioned president of a certain national banking association, then and there known as the National Bank of the State of Missouri, in St. Louis, which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there, and at

13 the times hereinafter mentioned, acting in carrying on a banking business under and by virtue of the said act and acts amendatory thereto, in the city of St. Louis, within said district, and said Barton Bates, being then and there and at the times hereinafter mentioned a director of said association, did conspire, combine, confederate, and agree together among themselves, and with certain other persons to the jurors aforesaid unknown, to wilfully misapply a large sum of money belonging to said association, to wit, the sum of two million dollars, by using and applying said sum to the purchase, in the name of the said James H. Britton, for the use of said association, from certain persons to the jurors aforesaid unknown, of a large number, to wit, twenty thousand shares of the capital stock of said association, which said purchase so to be made as aforesaid was not to be made in order to prevent loss upon any debt theretofore to be contracted with said association in good faith, and which said purchase so to be made as aforesaid was not to be made for the purpose of reducing the capital stock of said association in accordance with any vote theretofore had of shareholders owning two-thirds of the capital stock of said association.

14 And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of, and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the twenty-nineth day of March, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, six hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, ten certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one J. C. Havens, whose christian name is to said jurors unknown.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid the said James H. Britton did afterwards, to wit, on the second day of April,

in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid
15 unknown a large sum of money, to wit, twenty-four hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, forty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the book of said association to be the property of one Robert Campbell.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the seventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, eight hundred and forty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, fourteen certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Sophia K. Brown.

16 And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, thirteen thousand five hundred dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, two hundred and twenty-five certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Charles Waggins.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid
17 unknown a large sum of money, to wit, nine hundred and sixty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, sixteen certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Caroline L. Weston.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of *of* and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, twenty-nine hundred and

seventy-five dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, fifty certain shares of the capital stock of said association,
18 which said shares of stock were then and there represented upon the books of said association to be the property of one Julia Moffit.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the second day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown, a large sum of money, to wit, twenty-five hundred and eighty dollars, out of the moneys and funds then and there belonging to, and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, forty-three certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Richard C. Martin.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid,
19 the said James H. Britton did afterwards, to wit, on the fourth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, eleven hundred and forty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, nineteen certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one John Leighton.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, seventeen hundred and eighty-five dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Brit-
20 ton, from said unknown person, of a large number, to wit, thirty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Stephen D. Gore.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the twelfth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, thirteen hundred and eighty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, twenty-three cer-

tain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Helen R. Mason.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said con-
21 spiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, thirty-four hundred and eighty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton from said unknown person, of a large number, to wit, fifty-eight certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Edward Walsh, junior.

And the jurors aforesaid, on their oaths aforesaid, do further present that, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said James H. Britton did afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, pay to a certain person to the jurors aforesaid unknown, a large sum of money, to wit, twenty-nine hundred and fifty dollars,
22 out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, fifty certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one R. Wadeson, whose christian name is to said jurors unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

WILLIAM H. BLISS,
Attorney of the United States for the Eastern District of Mo.

And afterwards, at a regular stated term of the district court of the United States in and for the eastern district of Missouri, begun and holden at the city of St. Louis, in said eastern district, on the first Monday, the fourth day, of November, A. D. eighteen hundred and seventy-eight, the following proceedings were had of record in this case on Monday, the twentieth day of January, A. D. eighteen hundred and seventy-nine, to wit:

23 THE UNITED STATES, PLAINTIFF,
ag'st
JAMES H. BRITTON AND BARTON BATES, defendants. } No. 1478.

Indictment for conspiracy to commit offence, &c., section 5440 Revised Statutes.

Arraignment and plea.

This day comes the United States, by district attorney, and the said defendants being present in court, on motion of the district attorney, it is ordered that the said defendants be arrai'ned upon the indictment

herein against them, and upon the said defendant waived the reading of said indictment and formal arraignment thereon, and pleaded not guilty to the charges as contained in said indictment, and thereupon it is ordered that this cause be now continued until the next term of this court.

And afterwards, at a regular stated term of the district court of the United States in and for the eastern district of Missouri, begun and holden at the city of St. Louis, in said eastern district, on the first Monday, the fifth day, of May, A. D. eighteen hundred and seventy-nine, the following further proceedings were had of record in this case on Tuesday, the sixth day of May, A. D. eighteen hundred and seventy-nine, to wit:

24 THE UNITED STATES, PLAINTIFF, *ag'st* JAMES H. BRITTON AND BARTON BATES, defendants.

Indictment for violation of section 5440 of Revised Statutes of U. S.

This day comes the United States, by district attorney, and the said defendants being present in court in compliance with the recognizance heretofore entered into by them herein, the said defendants, with the leave of the court, withdraw the pleas of not guilty heretofore entered by them in this cause, and on the application of said defendants, by their attorneys, leave is given them to file their demurrers to the said indictment in the said cause; and thereupon the said defendants, by their attorneys, file their separate demurrers to the said indictment herein, and it is ordered that the said demurrers be, and the same are hereby, set down for argument on Thursday, the fifteenth day of May next (1879).

And the said separate demurrer, so filed by James H. Britton as aforesaid, is in the words and figures following, to wit:

Demurrer of J. H. Britton.

In the district court of the United States in and for the eastern district of Missouri.

25 THE UNITED STATES *against* JAMES H. BRITTON AND BARTON BATES. No. 1478.

And now comes the said defendant James H. Britton, in his own proper person, and, having heard the said indictment read, says that the said indictment and the matters contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound to answer the same, and this he is ready to verify. Wherefore he prays judgment & that by the court he may be discharged from the said premises in the said indictment specified.

JOHN B. HENDERSON,
CHESTER H. KRUM,
Att'ys for s'd Defendant Britton.

And the demurrer, so filed by said Barton Bates as aforesaid, is in the words and figures following, to wit:

Demurrer of B. Bates.

District court United States, eastern district of Missouri, May t. 1879.

THE UNITED STATES *against* BARTON BATES, JOINTLY INDICTED WITH James H. Britton for conspiracy	Indictment No. 1478. Nov'b'r t. 1878.

Now, at this day comes the said Barton Bates, in his own proper person, and the said indictment being seen and read by him, he
26 says that the same and the matters and things therein contained, in manner and form as they are above set forth and stated therein, are not sufficient in law, and that he, said Barton Bates, is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for the want of a sufficient in this behalf the said Barton Bates prays judgment, & that by the court he may be dismissed and discharged from the said premises in said indictment contained.

BARTON BATES.

GLOVER AND SHEPLEY, WITH
HENDERSON AND SHIELDS,
His Attorneys.

And afterwards, at said last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings were had of record in this case on Friday, the sixteenth day of May, A. D. 1879, to wit:

Order remitting indictment to circuit court.

THE UNITED STATES, PLAINTIFF, *ag'st* JAMES H. BRITTON AND BARTON BATES.	No. 1478.

Indictment for violation of section 5440 of the Revised Statutes of the United .

This day comes the United States, by district attorney, and on the motion of said attorney, it is ordered that the indictment pending in this court in the above-entitled cause be, and hereby is, now remitted and transferred to the next regular stated term and session of
27 the circuit court of the United States in and for the eastern district of Missouri, to be begun and holden at the city of St. Louis, in said eastern district, on the third Monday, the fifteenth day, of September next (1879), for proceeding thereon according to law; and it is also ordered that the said defendant, James H. Britton and Barton Barton, be and appear at and before said circuit court on said third Monday of September next, and at said regular stated term thereof, then and there to answer to the charges as contained in the said indictment herein against them, and not depart from said circuit court without leave thereof, in obedience to the recognizance heretofore entered

into by them in said cause; and it is further ordered that the clerk of this court make out certify to the said circuit court a full and complete transcript of the record and proceedings in said cause.

28 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true transcript of the record and proceedings in case No. 1478, A. D. 1879, of The United States, plaintiff, against James H. Britton and Barton Bates, defendants, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 18th day of August, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.

29 And afterwards, to wit, on the 29th day of January, 1880, the following proceedings were had and appear of record in said cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
JAMES H. BRITTON AND BARTON BATES, defendants. } 1536.

Now comes the United States, by William H. Bliss, esquire, district attorney, and also come said defendants, in compliance with their recognizances and by their attorney, and thereupon the demurrer to the indictment herein is argued and submitted, and by the court taken under advisement.

And afterwards, to wit, on the 10th day of March, 1880, the following proceedings were had and appear of record in said cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
JAMES H. BRITTON AND BARTON BATES, defendants. } 1536.

Now, at this day, comes the United States, by William H. Bliss, esquire, district attorney, and the defendant being in court in compliance with their recognizances herein and by their attorneys, this cause came on for hearing upon the demurrer of said defendants to the indictment herein, and upon the questions of law arising upon said
30 demurrer the judges were divided and opposed in opinion.

It is now, therefore, ordered that the clerk of this court make out and certify to the next term of the Supreme Court of the United States a transcript of the record and proceedings in this cause as fully as the same are described in the certificate of division this day filed.

MEMO.—His honor Judge Treat took no part in the hearing of this case.

It is further ordered that the foregoing order be here entered of record nunc pro tunc as of February 4, A. D. 1880.

Said certificate of division is in words and figures, to wit:

Certificate of division.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

UNITED STATES
vs.
JAMES H. BRITTON AND BARTON BATES. } No. 1536.

This is an indictment under § 5440 of the Revised Statutes of the United States, for conspiracy to wilfully misapply, in violation of § 5209 of said Revised Statutes, moneys of the National Bank of the State of Missouri, of which bank the defendant James H. Britton was president, and both defendants were directors. The following is a copy of the indictment:

(See page 1.)

To said indictment a demurrer filed as follows, to wit:

(See pages 24 & 25.)

And said demurrer coming on to be heard at this term of court, the following questions arose, to wit:

1st. Whether the second count sufficiently states an offence under sections 5209 and 5440.

2nd. Whether the allegation that the stock was to be purchased, and was purchased, for the use of the bank vitiates the first count of said indictment.

3d. Whether in other respects said count sufficiently states an offense under sections 5440 and 5209.

On which questions the judges were divided and opposed in opinion; whereupon, motion of the plaintiff, by his attorney, that the said points upon which the disagreement hath happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, to be finally decided:

It is ordered that the foregoing state of the pleadings and questions be certified according to the request of plaintiff, by its attorney, and as required by the law in that case made and provided.

Given under our hands and seals this fourth day of February, A. D. 1880.

GEO. W. McCRARY. [SEAL.]
HENRY C. CALDWELL. [SEAL.]

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true and complete transcript of the pleadings and proceedings in case No. 1536 of The United States, plaintiff, against James H. Britton and Barton Bates, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal

of said court, at office in the city of St. Louis, in said district, this 30th day of July, in the year of our Lord eighteen hundred and eighty.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1536. United States circuit court, eastern district of Missouri. United States against James H. Britton and Barton Bates. Duly certified transcript in the above-entitled cause.

(Indorsement on cover:) No. 411. The United States, plaintiff, vs. James H. Britton and Barton Bates. E. Missouri C. C. U. S. Filed 1t8h October, 1880.

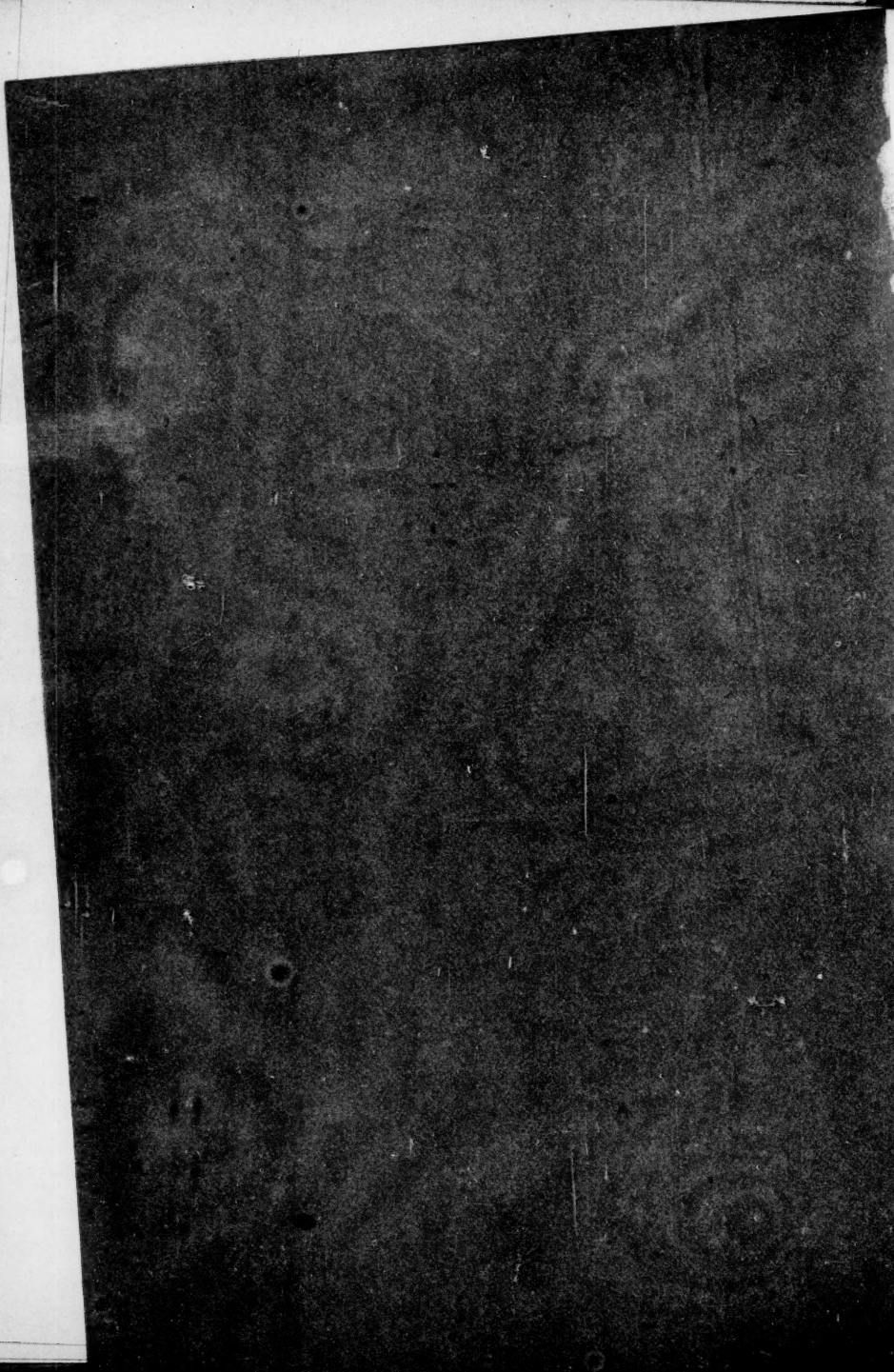
OFFICE SUPREME COURT U. S.
FILED
MAR 6 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

UNITED STATES
vs.
BARTON BATES AND JAMES H. BRITTON. } Nos. 409, 410, 411.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1882.

UNITED STATES
vs.
BARTON BATES AND JAMES H. BRITTON. } Nos. 409, 410, 411.

BRIEF FOR THE UNITED STATES.

CASE NO. 409.

This is an indictment under section 5440 Revised Statutes, charging the defendants with a conspiracy to misapply the funds of the National Bank of Missouri, in Saint Louis, of which the defendant Britton was president and a director, and the defendant Bates vice-president and a director, by declaring a fraudulent dividend on the capital stock of said bank with intent to injure and defraud the bank, and with actually misapplying said funds in that way to a large amount.

The defendants demurred to the indictment (R., p. 6), and upon the argument of the demurrer the court were

divided in opinion upon several questions, which have been certified to this court. (R., p. 8.)

We will consider these questions in their order.

First.

It is asked, substantially, whether the absence from any count of the averment that the conspiracy was entered into with intent to injure and defraud is fatal to the indictment.

There are only two counts in the indictment, and each of them avers that the defendants, as directors of the bank, did "conspire, combine, confederate, and agree together to willfully misapply, *with intent then and there to injure and defraud the said association and certain persons to the jurors aforesaid unknown*, a large sum," &c. Seeing, then, that each count *does* contain this averment, *quæstio cadit*.

Second.

It is next asked whether the dividend, which was the object of the conspiracy, should be alleged to have been made, and if so, whether the same is sufficiently charged, and whether it was also necessary to allege that the dividend was fraudulent when declared.

It is submitted that it was not necessary to make any averment in the indictment of the consummation of the object of the conspiracy. The offense charged is a *conspiracy to do an unlawful act*. Whether the act was done or not is quite immaterial, under this indictment, there being no handle to say that the conspiracy was merged in the offense resulting from the success of the conspiracy. Whart. Cr. L., section 1346 (8th ed.); People *v.* Rich-

ards, 1 Manning (Mich.), 222; People *v.* Mather, 4 Wend., 265. But if it was necessary, the averment made in that behalf is entirely sufficient. The indictment also alleges with certainty that the dividend was fraudulent when declared and when paid, all which, however, is, we submit, surplusage, because the offense charged is a conspiracy to declare and afterwards to pay a fraudulent dividend. It is the spirit that animated the conspirators, and not the consequences of the conspiracy that constitutes the offense.

Neither is it at all material under this indictment, whether the dividend declared was or not paid out of net earnings, for this, if so, was entirely compatible with a conspiracy to pay an illegal dividend. How can this court say, looking at the indictment, and it can look no further, that in the state of things mentioned the conspiracy could not have existed?

THIRD.

Was it necessary under section 5209 to charge that the funds alleged to have been misapplied had been previously intrusted to the possession of the defendants?

It is submitted that inasmuch as the offense charged is a combination or conspiracy to misapply the bank's funds by declaring and paying a fraudulent dividend, the consummation of those objects of conspiracy is not an element of the offense, and, therefore, it was not necessary to allege that the defendants had been previously intrusted with the funds misapplied. The actual misapplication of funds was one offense and the conspiracy to misapply them

quite another. The first is an offense under section 5440, and the second under section 5209.

But we submit that under no circumstances would it be necessary to aver that the funds misapplied had been previously intrusted to the possession of the defendant. The fine spinning resorted to by the defense to fritter away the significance of the word "misapplied" and make it no more than the equivalent of "embezzle" or "abstract" has nothing to commend it beyond its ingenuity. We have no fear that this court will be moved by so strained and artificial reasoning to emasculate the statute in this important particular.

An objection, very strenuously urged, is that there can be no prosecution under section 5209, which is founded on what is called a "deliberative act," and, therefore, that this indictment is not good, because the declaring a dividend is such an act.

We submit that no such distinction exists where the act charged was done *malo animo*. It makes no difference what is the character of the act resulting in a misapplication of a bank's money, *if it was done with the intention of violating the law*. Nobody contends that a mistaken exercise of discretion entails criminality. There must be present the *mens rea* to give the act a criminal complexion, and when that is present it becomes of no consequence whether the act was "ministerial" or "deliberative." This proposition cannot require discussion.

We submit that the offense is charged with all the definiteness required by the rules of criminal procedure.

FOURTH.

The question whether the indictment alleges with sufficient certainty that the bank had no net profits out of which to declare a dividend must, we submit, be answered in the affirmative, as the averments in both counts are direct and specific.

The first count avers, directly, that there were no net profits to the amount of the dividend declared.

But it is said that this averment is pregnant with the implication that there were net profits, albeit not enough to meet the dividend contemplated by the conspirators, and that this constitutes an uncertainty that invalidates the count. The force of this objection is not perceived, for, admitting all that is said, the defense wholly fail to show why there may not be a conviction under this count for a conspiracy to misapply so much of the money of the bank as was required to make up the difference between the amount of the dividend and that of the net profits, if any. The prosecution is not tied down to prove the amount named in the indictment precisely as laid.

The second count avers that there are debts due the bank unsecured, not in process of collection, and largely exceeding in amount the net profits then on hand. As no dividend can be declared in such a state of things under section 5204, Revised Statutes, it is not easy to see why a conspiracy to declare one is not indictable any more than it is to understand how either count is wanting in certainty of averment that the bank had no net profits. The objection to the second count seems to be that it did not

aver the sum total of the various amounts of indebtment set forth in the count, which is mere refining.

Fifth.

Whether it is enough to subject the defendants to the penalty of section 5209 to prove that they willfully voted for the dividend, knowing there were no net profits, and if so, whether the indictment must charge that the dividend was ordered or voted for with intent to defraud the association or other persons.

It is, perhaps, enough to say that no question as to the sufficiency of evidence can arise under the demurrer. The question here is as to the sufficiency of the indictment, and not as to the measure of proof necessary to sustain the indictment.

The charge is that the defendants conspired to bring about the declaration and payment of a fraudulent dividend; that the dividend, the object of conspiracy, was in fact declared, and that the defendants took from the assets of the bank their shares and proportions of said fraudulent dividend—allegations which are of themselves sufficiently evincive of fraud upon the bank, its innocent shareholders and creditors, without any additional averment.

But the indictment is not under section 5209, but under section 5440, which makes it penal to conspire to commit any offense against the United States. The offense charged is the unlawful combination to effect an illegal and fraudulent object, and the sufficiency of an indictment under section 5440 is not to be determined by the requirements for an indictment under section 5209.

CASE NO. 410.

This is an indictment under section 5440, Revised Statutes, charging a conspiracy between the defendants to make a fraudulent misapplication of the funds of the National Bank of the State of Missouri, by declaring and paying fraudulent dividends on the capital stock of said bank.

The defendants demurred to the indictment (R., p. 10), and on the argument of the demurrer the court were divided and opposed in opinion, and certified to this court several questions of law (R., p. 12), which we will consider in their order.

FIRST.

Whether, under section 5209 of the Revised Statutes of the United States, it was necessary to aver that the alleged conspiracy was entered into with intent to injure and defraud, and whether the several counts in this indictment not containing the the said allegation are good and sufficient in law.

We respectfully submit that, for the reasons amply stated in the brief in No. 406, to which we refer, it was not necessary to aver in the indictment that the alleged conspiracy was entered into with the intent to injure and defraud, and consequently, that the absence of such an averment does not make bad the counts in which the omission occurs.

SECOND.

This question is substantially the same as the second question certified in No. 409 against the same defendants. We respectfully refer to the brief in that case.

THIRD.

Whether the failure to aver that the conspiracy was entered into with intent to injure and defraud the association vitiates the first and third counts of said indictment.

For the reasons stated in the brief, in No. 406, we submit that this question must be answered in the negative.

FOURTH.

This is the same as the third question certified in No. 409 against the same parties, and we respectfully refer to our brief in that case, *supra*.

CASE NO. 411.

This is an indictment under section 5440, Revised Statutes, setting up a conspiracy between the defendants and other persons unknown willfully and fraudulently to misapply the funds of the National Bank of the State of Missouri, in which the defendant Britton was president and both defendants were directors, by purchasing shares of the bank's stock for the use of the bank, but for purposes not authorized by law, and so charging that the defendants had combined to violate the provision of section 5209, Revised Statutes, against the willful misapplication of the funds of a national bank.

The defendants demurred to the indictment (R., pp. 9, 10), and upon the argument of the demurrer the judges were divided in opinion upon several questions, which have been certified to this court (R., p. 12), and which we will now consider in their order.

First.

Whether the second count sufficiently states an offense under sections 5209 and 5440.

The first count alleges a willful misapplication "with intent to defraud the said association and certain persons to the jurors aforesaid unknown." But the second count omits the words above quoted from the first count. Does this omission affect the second count?

We submit that the omission has no effect on the count which, without the words in question, states a conspiracy to commit the offense of willful misapplication of the bank's money by purchasing the stock of the bank, not for the purpose of preventing loss or any antecedent debt, or for the purpose of a legitimate reduction of the capital stock of the bank.

The defendant is not to be heard to say that an illegal investment of the bank's money in its own stock, for its own use, is not a misapplication of money, because beneficial to the bank, seeing that nothing that is retrograde to the mandate of its charter can possibly be beneficial to a body corporate in legal intendment. The defense ask this court to assume to be wiser than the law it sits here to administer, in urging that the act of buying the stock in the teeth of the law may be adjudged no misapplication of funds under the law.

Second.

Whether the allegation that the stock was to be purchased and was purchased for the use of the bank vitiates the first count of said indictment.

As this count negatives by express averment that the stock was purchased for any purpose that would be legal, it is difficult to see how the application of the bank's funds for the illegal purchase of stock was any the less a fraudulent misapplication of the bank's funds because made for the bank's use, such use being in fraud of the charter and purposes of the bank and of the articles of association between the shareholders. It was clearly against the letter and the policy of the law for the funds of the bank to be tied up in any such way.

THIRD.

Whether in other respects said count sufficiently states an offense under sections 5440 and 5209.

The generality of this question is to be regretted, but it is submitted that it must be answered in the affirmative.

WM. A. MAURY,
Assistant Attorney-General.

OFFICE SUPREME COURT U.S.
FILED
NOV 3 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
JAMES H. BRITTON
AND BARTON BATES.
} *Nos. 409, 410, 411.*

On Certificate of Division of Opinion from the Eastern District of Missouri.

BRIEF OF CHESTER H. KRUM,

Of Counsel for Defendants.

LEVISON & BLYTHE STATIONERY CO. PRINT, ST. LOUIS.

As this count negatives by express averment that the stock was purchased for any purpose that would be legal, it is difficult to see how the application of the bank's funds for the illegal purchase of stock was any the less a fraudulent misapplication of the bank's funds because made for the bank's use, such use being in fraud of the charter and purposes of the bank and of the articles of association between the shareholders. It was clearly against the letter and the policy of the law for the funds of the bank to be tied up in any such way.

THIRD.

Whether in other respects said count sufficiently states an offense under sections 5440 and 5209.

The generality of this question is to be regretted, but it is submitted that it must be answered in the affirmative.

WM. A. MAURY,
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Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
JAMES H. BRITTON
AND BARTON BATES.
Nos. 409, 410, 411.

BRIEF IN BEHALF OF DEFENDANTS ON CERTIFICATE OF DIVISION OF OPINION.

The defendants were indicted in the Circuit Court of the United States for the Eastern District of Missouri, under Section 5440 of the Revised Statutes, for conspiracies to wilfully misapply moneys of the National Bank of the State of Missouri, of which bank the defendants were directors. Three indictments were found upon this statute. Under the certificate of division of opinion, these stand before this court numbered 409, 410 and 411. As the main question necessary to be discussed is common to the three indictments, I include in one brief my objections to them all.

INDICTMENT UPON RECORD 410.

This indictment contains five counts, which all relate to an alleged conspiracy to induce the Board of Directors of the banking association to declare and pay a dividend, when such dividend had not been earned.

The first and third counts do not aver that the conspiracy was entered into with the intent to injure or defraud the association. The other counts contain this averment. With this exception, the counts are substantially alike. One may be taken as a sample of them all.

Assuming that the first and third counts are wholly insufficient, because they do not allege a fraudulent intent (United States *vs.* Conant, Browne's Nat. Bank Cases, 148; United States *vs.* Voorhees, 9 Fed. Reporter, 143), I respectfully submit that the questions certified should be answered adversely to all of the indictments.

I.

There is no allegation that the defendants induced or procured the directors to actually declare the fraudulent dividend.

The conspiracy charged is as follows: That the defendants did "conspire, combine, confederate, and agree with each other, and with certain other persons to the jurors aforesaid unknown, to wilfully misapply a large sum of money belonging to and the property of said association, to-wit, the sum of eighty-seven thousand five hundred dollars, by means of procuring to be made, on the 30th day of June of said year, by the board of directors of said association, a dividend of three and one-half per centum upon the capital stock of said association, said capital stock being then and there the sum of two millions five hundred thousand dollars; that is to say, by the apportionment out of the moneys of said association, to each and every person then and there owning shares of the capital stock of said association, the sum of three dollars and fifty cents upon each and every of said shares, *which said dividend, so to be made as aforesaid, was to be, on the said 30th day of June* aforesaid, greater in the sum of eighty-seven thousand five hundred dollars than the net profits of said association on hand at the time last aforesaid, after deducting from said net profits the amount of the losses and bad debts of said association existing at the said time last aforesaid."

The date of the conspiracy is laid on June 29, 1878.

Certain acts are charged to have been done in furtherance of the conspiracy; but the foregoing extract constitutes the entire charge of conspiracy as laid in the indictment.

The indictment is, therefore, for conspiracy to induce others to declare the unlawful dividend. The banking association was to be induced to declare the dividend;

but there is no allegation that the dividend was declared. Upon this statement, merely, it is evident that the indictment cannot be sustained.

Section 5440 declares it to be criminal for two or more persons to conspire to commit an offense against the United States. The conspiracy is a misdemeanor. Wilful misapplication under Section 5209, is also a misdemeanor. If the declaration of an unearned dividend by the board of directors, and its subsequent payment, amount to a wilful misapplication, under Section 5209, then the defendants conspired to incite the board of directors to commit a misdemeanor. If the misdemeanor had actually been committed, then the defendants would be responsible under Section 5440.

The following propositions have been fully established as the law governing charges of conspiracy by the courts of the United States:

A conspiracy to commit a misdemeanor, where the conspiracy is consummated by the commission of the offense, is not merged in the executed crime. The conspirators may be prosecuted for the unlawful combination.

United States *vs.* McDonald, 3 Dill. 543;
United States *vs.* Bayer, 4 Dill. 407.

Procurers and abettors of statutory offenses are punishable under the statute, although not expressly referred to in the statute.

United States *vs.* Bayer, *supra.*

A conspiracy, under Section 5440, is not an attempt. While the statute requires an act to be done in furtherance of the conspiracy, yet the offense does not consist of both the conspiracy and the act so done, but of the conspiracy alone.

The act to be done in furtherance of the conspiracy merely affords a *locus pœnitentiæ*, before the arrival at which either or all of the parties may abandon their design and avoid the consequences of crime. But the act done does not constitute part of the offense. The conspiracy is the offense.

United States *vs.* Doman, 17 Int. Rev. 181.

And, of course, it is a settled rule that common law offenses are unknown to Federal jurisdiction. Offenses against the laws of the United States are offenses declared to be so by the statutes of the United States.

What are the consequences of these established rules? Manifestly, that two or more who combine to commit an offense against the laws of the United States are liable, whether the offense be actually committed or not, provided some one of them does an act in furtherance of the conspiracy. If they combine to induce one other than themselves to commit such offense, and the individual so influenced does commit the offense, then they are liable, provided one of themselves has done some act in furtherance of the conspiracy. They could be proceeded against either for the conspiracy or (certainly, where it was a misdemeanor) as principals in the commission of the consummated crime.

But an attempt to commit a crime against the laws of the United States is not an offense under Section 5440. A conspiracy to incite others to the commission of an offense, where the offense is not committed, is not a punishable combination or crime.

The statute does not declare it to be criminal to incite others to the commission of offenses. If one procures or abets the commission of a misdemeanor, he is liable as principal with the doer of the forbidden act as soon as the crime has been committed. But an attempt to commit the misdemeanor denounced by Section 5209 is not

declared to be an offense by the statute. To incite another to commit the misdemeanor is not declared to be an offense. It cannot be an offense unless the crime has actually been committed. This follows from the law in regard to misdemeanors. It is true that one who incites another to the commission of either a felony or an indictable misdemeanor is, at common law, guilty of a misdemeanor, where the person so incited does not actually commit the offense. But the laws — the statutes — of the United States do not make any provision for such cases, which can support the present indictment. Hence I submit, that if to declare and pay an unearned dividend be a wilful misapplication of the moneys of a national bank, under Section 5209, then where two or more conspire to secure such action by the directors of the bank, and the dividend is actually declared, the parties to the conspiracy are liable with the directors as principals in the executed crime. They may be indicted either for the conspiracy or for the consummated crime. *But where the conspiracy is to induce or incite such action on the part of the directors, and the dividend is not declared, the conspiracy is not a punishable offense under the statutes of the United States. It is a conspiracy to induce others to attempt the commission of a misdemeanor, and is not a punishable offense.*

II.

The indictment states no offense whatever, even if it be held to allege that the dividend was declared.

Section 5440 punishes a conspiracy to commit an offense against the laws of the United States. To wilfully misapply the moneys of a national bank is an offense when done by its directors. To induce such directors to wilfully misapply the moneys, when the wilful misapplication takes place, is an offense, because the incitor is liable as a principal with the doer of the crime; but neither incitor nor director can be punished unless the director himself has been guilty of wilful misapplication. It is not enough that the incitor may have desired that the directors should wilfully misapply the moneys. The act done by the directors must have amounted to wilful misapplication, *when done*, in order to impose liability upon the incitor. So, a conspiracy on the part of the directors to wilfully misapply the moneys of the association is an offense. To conspire to induce them to wilfully misapply would be an offense if the wilful misapplication actually took place. But unless the wilful misapplication was made by the directors, there would be no offense on the part of the conspirators. The present indictment does not state facts sufficient to constitute an offense on the part of the directors in declaring and paying the unlawful dividend. The misapplication must not only have been wilful, but it must have been made with intent to injure and defraud the association. *But the indictment does not charge that the board of directors were guilty of any unlawful intent in declaring and paying the dividend.* A merely mistaken infraction of the statute cannot have rendered the board of directors liable for a wilful misapplication, with intent to injure

or defraud. It is well settled that where a particular intent constitutes an essential feature of the crime, mistake or ignorance of the law as well as of fact may negative the existence of this intent.

Meyer *vs.* The State, 1 Conn. 502;
Jackson *vs.* Andrews, 7 Wend. 152;
The State *vs.* Holmes, 17 Mo. 379;
United States *vs.* Connor, 3 McLean, 573;
The Commonwealth *vs.* Rogers, 7 Metc. 500.

The indictment does not allege an unlawful intent on the part of the directors. They may have been mistaken. The dividend may have been wholly unauthorized, and yet the directors may have supposed that it was proper, expedient, and lawfully declared.

They must have intended to injure or defraud the association, or their declaration and payment of the dividend constituted no offense. If they were innocent in the matter,—if they themselves committed no offense, —their unwitting furtherance of the schemes of the conspirators did not bring the conspiracy within the statute.

But it may be said that this position utterly misconceives the meaning of the indictment. It may be urged in behalf of the United States that, the conspiracy being to misapply, such misapplication could well be effected through innocent agents, and that it is not necessary to allege that the individuals who declared the dividend were themselves guilty of crime. It may be urged that the defendants, by reason of their offices of president and vice-president, by reason of some relation of trust and confidence resulting from such official *status* alone, could be guilty of misapplication of the moneys of the association whenever they became possessed of them by any process, however unlawful, and instead of preserving them for the purposes of the association, converted them to their own use. This is the only theory upon which this indictment can possibly be maintained.

But the unsoundness of such a theory is manifest. In the first place, neither the president nor the vice-president, nor a director of a bank, has possession of the moneys of the association by virtue of his office alone. That possession is in the cashier. I have discussed this proposition sufficiently in my argument upon the question certified under the indictment against Britton alone, in Record No. 406. I have only to say that, in view of the authorities, the proposition can not be successfully disputed.

Hodge *vs.* National Bank, 22 Gratt. 51.

Two defendants, then, who are not in possession of the moneys of the bank, conspire to obtain such possession and to convert the moneys to their own use. How can this be a conspiracy to misapply the moneys of the bank? The language of the statute is: Every president, director, etc., who shall *embezzle*, *abstract* or *wilfully misapply* any of the moneys, funds, or credits of the bank with intent to injure and defraud shall be guilty of a misdemeanor. The statute covers presidents, directors, cashiers, tellers, clerks, and agents. When the statute says that if either of such officers shall embezzle, abstract, or wilfully misapply, what does it mean? How must such officers be situated with reference to the moneys of the bank in order to make it possible for them to conspire to wilfully misapply? I assert that there can be no other view consistent with the evident intention of the lawmakers than that, before such officers or agents can wilfully *misapply* the moneys or funds of the bank, such moneys or funds must have been put in their possession under a duty to use them in a certain specified manner.

"We must suppose," said Judge Dillon, in Clayton's case (2 Dill. 224), "in the enactment of statutes, particularly statutes as important as the one under consideration, that Congress weighed well the words it employed. * * * Statutes enjoin obedience to their requirements; and unless the contrary appears, it is to be taken that the legislature did not use the words in which

its commands are expressed in any unusual sense. For these reasons, whose cogency is obvious, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language is used in no extraordinary sense, but in its common, everyday meaning. When courts in construing statutes depart from the language employed by the legislature, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to *interpret* the legislative will, not to supplement it or to supply it. * * * Accordingly, courts in the construction of statutable offenses, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or omission to be a crime, and punish it, when in fact the legislature had never so intended. 'If this rule is violated,' says Chief Justice Best, 'the fate of the accused person is decided by the arbitrary discretion of the judges, and not by the express authority of the laws.'"

Fletcher *vs.* Lord Sondes, 3 Bing. 580.

If the word *misapply* has been used in its ordinary sense, and it must be held to have been so used, then, before one can *misapply*, it must have been his duty to *apply* the property or funds in his hands in some manner designated by those who confided the property to him. The statute can mean nothing else. I have called attention to what I conceive to be the proper construction of the statute, under the individual indictment against Britton, in Record 406. This indictment for conspiracy only serves to enforce that argument. The views entertained by the prosecution must involve the court in the greatest possible absurdities if they are followed and approved.

Clerks are within the statute. A book-keeper is within the statute. Book-keepers, who have nothing whatever to do with the moneys of the bank, are within the statute.

If two or more book-keepers conspire to induce the directors to turn over to them a part of the moneys of

the bank, and resolve, among themselves, to secure the money by false and fraudulent representations to the directors, would such conspiracy be one to wilfully misapply such moneys? The character of the conspiracy depends upon the nature of the act which the conspirators combine to do. To obtain moneys from the directors by false and fraudulent representation is not an offense under the laws of the United States. By calling such offense wilful misapplication, because the maker of the false representation used the money for his own purposes after he obtained it, is to confound all settled notions of distinctions between offenses, and between doctrines of Federal and State jurisdictions. To obtain money from the bank by false pretenses is an offense against the State, but not against the United States.

Messengers employed by the bank to deliver notices merely, are within the statute. They are agents within the scope of their employment. They have nothing to do with the moneys of the bank. If two or more of them conspire to burglarize the bank, and, in furtherance of the conspiracy, some act is done short of the burglary itself, can they be indicted, under Section 5440, for a conspiracy to wilfully misapply, under Section 5209, because, if they had gotten the money, they would probably have converted it to their own uses?

After bank hours, tellers are not in possession of any part of the moneys of the bank. If two or more conspire feloniously to take a part of the moneys, after the bank has been closed for the day, and an act in furtherance is done, do the conspirators fall within Section 5440, because, if they had obtained the money and converted it to their own use, they would have *wilfully misapplied* such money under Section 5209? A bank-teller cannot embezzle funds after they have been returned to the general custody of the cashier. He cannot conspire to so embezzle. He can no more conspire to misapply.

Where can the court stop, if the views of the prosecution are to obtain under Section 5209? The larceny of

moneys of a national bank is not an óffense against the United States, even when committed by the president or teller. But it becomes *wilful misapplication* because, after the felonious taking, the wrong-doer converted the moneys to his own use. The robbery of moneys of a national bank by taking them from the person of a messenger, to whom they had been intrusted, is not an offense against the United States, even when such robbery is committed by some clerk of the bank. But the robbery becomes *wilful misapplication* when, after the forcible taking, the robber converted what he took to his own use! And hence, when two or more clerks, who have nothing to do with the moneys of the bank, to whom no part of such moneys has ever been intrusted, conspire to rob, or commit larceny, or work a trespass, or use false pretenses, with the expectation that they will thereby unlawfully become possessed of some of the moneys of the bank, they are guilty of a conspiracy to *wilfully misapply*, because, if they had gotten the money, they would have converted it to their own use!

It can not be that such a construction can be given to the statute without imputing absurd legislation to Congress. The law-makers must be held to have confounded all distinctions between offenses; all differences between remedies against crime must have been ignored, and terms whose meaning was well known before the statute, used in some unnatural and unheard-of sense; or else the law should be read, as the defendants insist, so as to limit misapplication to cases where possession and confidence imposed create a duty to apply in some defined and indicated manner. Such reading gives sense to the statute. None other can. A conspiracy to obtain possession of moneys of a national bank by means of fraudulent contrivances, can not be a conspiracy to wilfully misapply the moneys of the bank. And hence, if this indictment means that the directors were the innocent agents of the defendants, its allegations do not state the merest semblance of an offense.

III.

The indictment does not allege, in any of the counts, that the dividend was fraudulent when declared.

The counts allege that on the 29th day of June, 1876, the defendants conspired to induce the directors to declare a dividend on the 30th day of June, 1876; "which said dividend, *so to be* made as aforesaid, *was to be*, on the said 30th day of June aforesaid, *greater* in the sum of $87,500 than the net profits of said association on hand at the time last aforesaid, after deducting from said net profits the amount of the losses and bad debts of said association existing at the said time last aforesaid."

The conspiracy contemplated a dividend thereafter to be declared. That dividend was to be fraudulent. Its fraudulent character was to result from its excess over certain net profits at the time of its declaration. I imagine that if, in point of fact, the dividend actually declared was lawful, no punishment could be visited upon the defendants for having hoped and labored for a false and fraudulent one. But, while the dividend was to be declared upon a subsequent day; while, if the imagination can be brought to one's rescue, it may be conjectured that the dividend, looked for, actually came along, yet when it did come it was lawful—it was not in excess of net profits; because the indictment does not allege that when the dividend was declared it was fraudulent, as being in excess in the particulars anticipated in the event of its declaration. The defendants strove to obtain a fraudulent dividend. They obtained the dividend. But they builded better than they knew. The dividend was lawful. The defendants were brilliantly successful in getting the money. They were equally suc-

cessful in committing no crime. It is true that the defendants did not intend to secure this salutary result; but for accepting the situation they can hardly be blamed. The statute 1 Edw. II., enacted that a prisoner who broke prison should be guilty of felony. But Plowden says that if the prison be on fire, that is not so, "for he is not to be hanged because he would not stay to be burnt." The defendants can not be savagely censured for having accepted a lawful dividend where they had anticipated an unlawful one. They have done the best they could under the circumstances.

I submit that the indictment contained in Record No. 410 is therefore insufficient in all of its counts.

IV.

The indictment in Record 409 contains two counts. They are for a conspiracy to wilfully misapply moneys of the bank. The second count contains no allegation that the conspiracy was to misapply with intent to injure and defraud. It is therefore hopelessly bad, and need not be considered.

U. S. *vs.* Conant, *supra.*
U. S. *vs.* Voorhees, *supra.*

The first count alleges the fraudulent intent. It alleges that the defendant, Britton, who was president, and the defendant, Bates, who was vice-president, conspired to wilfully misapply moneys of the bank by using the same in the purchase of the stock of the bank in the name of Britton, *for the use of the bank.* The purchase, however, was not to be made to avoid loss on account of debts previously contracted in good faith, or to reduce the stock in accordance with a vote of two-thirds of the stockholders theretofore made. Acts done in furtherance of the conspiracy are also alleged. It is difficult to treat this indictment with the slightest degree of seriousness.

I.

The indictment is manifestly repugnant.

The allegation is that the defendant and Bates conspired to purchase for the bank some of its own stock, with intent to injure and defraud the association. It is not even alleged that the act done did not have the full concurrence of the association. Hence the association did assent. The purchase was made for the association. It fully assented to the purchase. But the purchase was made with intent to injure and defraud the association! An indictment for selling iron by false weights and measures has been held bad for repugnancy, for it is absurd to say that iron can be sold both by weight and measure at the same time.

2 Hawk. P. C., c. 25, sec. 62.

If an indictment charge a man with forging an instrument by which A. was bound to B., it is bad; for A. could not be bound by the instrument if it were forged. An indictment for larceny which describes the stolen goods as the property of a person deceased is insufficient.

United States *vs.* Mason, 2 Cranch C. Ct. 410.

It can not be good pleading to say that, B. assenting thereto, A., with intent to defraud B., bought for B. certain property with B.'s money. As stock in a national bank is a liability of the bank, it is not easy to see how a purchase for the bank of its own stock could have been made with intent to injure and defraud the bank. At all events, the indictment fails to show how this could be done.

II.

Those sections of the Bank Act which prohibit purchases of stock by the banks, except upon certain conditions, do not provide any penalty for the violation. The courts have always regarded them as containing no penal clause.

O'Hare *vs.* Second National Bank, 77 Pa. St. 96.
Shoemaker *vs.* National Bank, 31 Md. 396.
Union Bank *vs.* Matthews, 98 U. S. 621.

Their violation can not be made a crime, either by virtue of their own provisions or by virtue of Section 5209. There can be no such a thing as a conspiracy to misapply moneys of a national bank by purchasing for the bank its own stock, when the purchase was not necessary to prevent loss on debts previously contracted. The purchase would not be a criminal offense. An agreement to make such purchase can not be criminal.

III.

The indictment does serve to show how clear the meaning of the statute was to the grand jury who found the bill.

Wilful misapplication means any use of moneys of a national bank by any of its officers, when he happens thereby to contravene some requirement of the banking laws. It is not material what his duties as to the business of the bank may be; it is not material that what he does has the full concurrence of the association; it is not material whether, in a given instance, he has had the money confided to his possession, or has wrested such money from the association in violation of its own rights—let the money be used, either for his own purposes or for those of the association, he wilfully misapplies it whenever he makes a disposition of the money in contravention of any requirement or prohibition of the bank laws, whether such prohibition be penal or only directory.

Larceny and misapplication, robbery and misapplication, false pretenses and misapplication, burglary and misapplication, trespass and misapplication, are all synonymous terms. And while these easy methods of giving meaning to the term obtain, as applicable to uses of the money of the bank without its consent, yet the same intelligent view of the statute enables the prosecutor to convict a bank officer of wilful misapplication where the officer employs the moneys of the bank in ventures for the bank, and with the assent of the bank. Such is the statute! None but itself can be its parallel!

The indictment, in Record 411, contains two counts. Each charges a conspiracy to wilfully misapply, by inducing the board of directors to declare an unlawful dividend. They are both insufficient.

I.

The first count contains a very singular averment. It alleges that the dividend was to be of "net profits *on hand, in the moneys and funds* of said association, on said thirtieth day of June aforesaid, which said dividend, so to be declared and paid as aforesaid in pursuance of said conspiracy, was to be false and fraudulent in this, that there were, on said thirtieth day of June, *on hand in the moneys and funds of said association, no net profits* amounting," etc. In a recent case in the House of Lords, it was argued thus: "It is difficult to suppose any species of profits which the phrase 'certain and uncertain profits' would not comprehend. Like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without a nightcap, it would seem to exhaust the subject."

Repton *vs.* Hodgson, 3 H. L. Cas. 79.

When Britton conspired with Bates for a dividend—profits or no profits—he certainly provided for every contingency!

II.

Both of the counts are repugnant and argumentative.

1. The first count states that there were on hand no net profits *amounting* to $87,500. Did they amount to $87,499.99? If they did, the court will hardly say that so small a difference ought to sustain so grave a charge. If they did not amount to so much, the indictment does not show it, and the court cannot supply the difference by argument or intendment.

2. The second count mentions certain debts which are said to have fallen within the designation of bad debts under the statute, because interest had not been paid within the prescribed period. But there is no allegation applicable to any particular debt.

Finally. The counts are open to the objection, applicable to all of the counts touching dividends, namely, that for bank officials to secure the payment of an unearned dividend to the stockholders cannot be a misapplication of the moneys and funds of the bank.

It seems to me that this objection meets fairly all of the dividend counts in all of the indictments. *Can there be such a thing as a misapplication of one's moneys and funds by another, which merely returns such moneys and funds to the owner?* The court will observe that no injury is shown to have followed to the bank. The unearned dividend was declared. The unearned dividend was paid. But the bank was uninjured. Its stockholders merely received that which was already their own. Depositors and creditors are not alleged to have been injured. The bank is not alleged to have had a depositor. It is not alleged to have had a creditor. Instead of securing a dividend out of the net profits of the bank's business, the defendant and Bates conspired to induce the directors to pay a dividend out of the moneys and funds of the association. These moneys and funds were the property of the association. They were the property of the stockholders. They were paid to and distributed among the stockholders. Can this constitute wilful misapplication, with intent to injure the very individuals who merely receive their own? A conspiracy to do an unlawful act is not a ground of civil redress, if it do not result in an overt act causing damages. If the conspiracy result in depriving the object of it of some benefit which he hoped and expected to obtain, but over which he had no legal interest or right, he has not sustained any damage within the meaning of the law. As where the defendant conspired to induce the plaintiff's father to revoke a will in the plaintiff's favor, and succeeded in obtaining a revocation, the plaintiff will have suffered no damage in a

legal sense; he was deprived of no property; he was merely disappointed in his hope of receiving a gratuity.

Hutchins *vs.* Hutchins, 7 Hill, 104.
Austin *vs.* Barrows, 41 Conn. 287.
Adler *vs.* Fenton, 24 How. 407.
Lamb *vs.* Stone, 11 Pick. 527.

This being the rule governing civil proceedings, that upon which indictments rest must necessarily be even firmer and more stringent in its requirement of damage resulting from the concerted act. If the result be not an injury—if the act be simply to return to the owner what is already his own—I deny utterly that the act can afford ground for civil remedy, or lay the actor open to criminal punishment. To give to one his own cannot be to misapply the thing so given. It might be that, in the case of a bank, by proper averments an injurious conspiracy could be laid, which had for its purpose the payment of an unearned dividend. But the necessary averments are not to be found in any of these indictments. They make no case other than that of the mere payment to stockholders of an unearned dividend—the mere distribution among the owners of that which was already their own. Not one creditor is shown to have been in existence. Not one debt is alleged to have been due from the association. The distribution is not alleged to have caused any disturbance in the bank's affairs. No interference by the supervising officer of the government is shown to have been the result of the distribution of funds. The interests of the bank were not affected. Its functions were not impaired. Its powers and privileges were in no sense or degree changed or impaired. In what, then, can be found the elements of crime? Will the court fancy a wrong? Will the court not rather look for and require a substantial wrong to be done, before it will overwhelm the doer of the act with the momentous consequences of conviction of crime?

See United States *vs.* Crafton, 4 Dill. 145.

I submit, with confidence, that the mass of paper upon which these voluminous charges have been preserved bears no evidence of the commission of crime by these defendants. They did no wrong in fact. They intended no wrong by their acts. They are shown to have simply used the property of the stockholders for the purposes of the stockholders themselves; and to leave them to the consequences of crime for these acts is to subvert the banking laws by substituting the court for the legislature, and giving the statute a meaning which is foreign to its purposes and repugnant to its real and true intent.

Chester H. Krum

~~CHESTER H. KRUM~~,
Of Counsel for Defendants.

OFFICE SUPREME COURT U. S.
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IN THE

SUPREME COURT UNITED STATES.

UNITED STATES
vs.
BARTON BATES AND JAMES H. BRITTON

CASE No 409. & 410

STATEMENT, ARGUMENT AND BRIEF FOR BARTON BATES.

GLOVER & SHEPLEY,
Attorneys.

IN THE

SUPREME COURT UNITED STATES.

UNITED STATES

vs.

BARTON BATES AND JAMES H. BRITTON.

CASE No. 409.

STATEMENT BY GLOVER & SHEPLEY, ATTORNEYS FOR BARTON BATES.

There are two counts in this indictment. The first count charges (1) that defendants, *Bates* and *Britton* were directors of the National Bank of the state of Missouri on June 30, 1876, and as such directors, conspired, combined, confederated and agreed together to wilfully misapply, with intent to injure and defraud the said association and certain persons, to the jurors unknown, of a large sum of money, to-wit: eighty-seven thousand five hundred dollars, then belonging to the moneys and funds of said association, by *causing* and *procuring* to be by said association then declared; and afterwards, on 10th of July, 1876, by said association, paid out of the moneys and funds of said association the said sum as a dividend of three and one-half per centum upon the capital stock of said association; that is to say, by means of causing and procuring, as directors aforesaid, to be declared and paid as aforesaid upon each and every of a large number, to-wit: 25,000 shares of the capital stock of said association the sum of three dollars

and fifty cents as and for a dividend of net profits of said association *on hand* in the moneys and funds of said association on said 30th day of June aforesaid.

(2) That said dividend so to be declared and paid, as aforesaid, in pursuance of said conspiracy was to be false and fraudulent in this—that there were on said 30th of June, 1876, on hand and in the moneys and funds of said association no net profits *then amounting to the said sum of eighty-seven thousand five hundred dollars*, as they, the said defendants, then and there well knew.

(3) That on said June 30th, the said Brittain director, as aforesaid, did in pursuance of and in order to effect the object of said conspiracy, falsely represent to one Julius S. Walsh, he, said Walsh, being on said June 30th, 1876, a director of said association, in substance and to the effect that the net profits of said association on said 30th of June on hand were sufficient in amount to warrant and permit the declaration of said dividend; and did, on said 30th day of June, by means of said false representations induce and procure the said Julius Walsh to assent on said 30th of June to the declaration of said dividend and to join the said defendants in the declaration of said dividend; they, said Brittain, Bates and Walsh, on said June 30th, constituting a majority in numbers of the directors of said association.

(4) That afterwards, on June 30th aforesaid, said Britton, in further pursuance of, and in order to effect the object of said conspiracy, did cause and procure to be made by one Edward P. Curtis, in a certain book then belonging to, and then in use by said association for the purpose of keeping a record of proceedings of the board of directors of said association the following minutes and entry, that is to say,

"ST. LOUIS, June 30, 1876.

Present Messrs. Britton and Walsh, Mr. Bates assenting on the 29th, ordered that a dividend of 3½ per cent. be

declared payable on the 10th proximo, and that the transfer books be closed till that date.

"Attest: EDW. P. CURTIS,
Cashier."

(5) That afterwards, July 8, 1876, the defendant Britton in further pursuance of and in order to effect the object of said conspiracy so had, being then director as aforesaid, did collect and receive from said association, and convert to his own use, $5,397 on the day last aforesaid part of said $85,500.

(6) That afterwards, July 11th, 1876, the defendant Bates in further pursuance of said conspiracy, and in order to effect the object of it, did collect and receive from said association and convert to his own use $4,112, part of said $87,500, contrary to the form of the statute and against the peace and dignity of the United States.

The second count is in substance like the first, except that it contains the following amendment, to-wit:

"That there were on said 30th June due and owing to said association the following debts: that is to say, from one James H. Britton the sum of $183,239.10; from one Richard L. Dickson the sum of $132,673.49; from James B. Eads and Barton Bates, trustees of the estate of Charles K. Dickson deceased, the sum of $75,000; from James B. Eads and Barton Bates, executors of the estate of Charles K. Dickson deceased, the sum of $15,081.18; from John A. Dillon the sum of $32,000; from John A. Ubedell the sum of $195,978.50; from George F. Brittain the sum of $25,319.35; from Alfred M. Britton the sum of $37,122.67; and from and on account of one John J. Roe, then deceased, the sum of $100,000; which said debts then amounted in the aggregate to the sum of $797,214.29. That upon said debts so due and owing as aforesaid, there was interest owing to said association then past due and unpaid for a period of six months. That said debts so due and owing as aforesaid, were not then well secured and

in process of collection, *and which said aggregate amount of said debts was then largely in excess of the net profits and* PURPORTED NET PROFITS *of said association then on hand*, as they the said defendants well knew; and said debts were bad debts within the meaning of Section 5204 of the Revised Statutes of the United States, as the said defendants well knew." This count contained no further averment concerning net profits.

The defendants demurred to this indictment; and on the hearing of the demurrer the judges were divided in opinion, touching the following questions certified to this court:

(1) Whether under Section 5209 Revised Statutes United States, it was necessary to allege that the alleged conspiracy was entered into with intent to injure and defraud; and whether the counts in this indictment not containing said allegations are good and sufficient in law.

(2) Whether it was necessary in this indictment in addition to the allegation charging conspiracy to wilfully misapply certain funds and property of the association by means of procuring to be made by the board of directors a dividend as alleged in the indictment; to further allege that said dividend was in pursuance of said conspiracy declared and made; and if so, whether the same is sufficiently charged therein; and whether it is also necessary to allege said dividend was fraudulent when declared and also when paid.

(3) Whether under Section 5209 Revised Statutes United States, it was necessary in this indictment to charge that the funds alleged to have been misapplied had been previously entrusted to the possession of defendants.

(4) Whether the indictment in this case alleges with sufficient certainty that the bank had no net profits out of which to declare and pay the dividend alleged to have been fraudulent?

(5) Whether the said defendants as directors of said banking association, are liable to the penalties provided by said Section 5209 upon proof that they, as directors, wil-

fully voted for the declaration of a dividend knowing that there were no net profits out of which to pay the same; and if liable, must the indictment charge that such dividend was ordered or voted for with intent thereby to defraud the association or other persons?

United States vs. Barton Bates and James H. Britton:

STATEMENT FOR THE DEFENDANT BATES OF CASE 410.

The indictment in this case contains five counts.

(1) The first count charges no intention to defraud in any form.

(2) The first count contains the following in respect to net profits on hand, to-wit:

"Which said dividend so to be made as aforesaid, was to be on said 30th June, aforesaid, greater in the sum of $87,500 than the net profits of said association on hand at the time last aforesaid, *after deducting from said net profits the amount of losses and bad debts of said association existing at the time last aforesaid.*"

(3) In respect to the alleged order of June 30, 1876, set forth in the indictment in case 409, said first count in this case calls it "a certain purported order." Otherwise said first count is substantially like that in case 409.

The second count of indictment in case 410, is like the first, except that it charges intent to defraud as in case 409.

The third count of indictment in case 410, charges no intent to defraud, otherwise is like the first and second of case 410.

The fourth count charges intent to defraud as in the second count of 410, otherwise is like the first count of 410.

The fifth count in 410, charges intent to defraud as charged in its other counts, and sets forth a number of debts as existing at the date of the alleged "*purported*

order," avers that on said debts interest was past due for six months preceding and unpaid, which said debts were not well secured and in process of correction on June 30th, 1876, and were bad debts, otherwise said fifth count is like the first in case 410.

The defendants demurred to the indictment in case 410, and on the hearing thereof the judges were divided in opinion touching the same questions as in respect to the indictment in case 409.

Assignment of errors by defendant Bates.

First. The Circuit Court erred in not sustaining the defendant's demurrer to the indictment in case No. 409.

Second. The Circuit Court erred in not sustaining the defendant's demurrer to the indictment in case No. 410.

BRIEF OF ARGUMENT IN SUPPORT OF DEMURRER TO INDICTMENT IN CASE NO. 409.

By GLOVER & SHEPLEY,
Attorneys for Bates.

FIRST. THE FIRST COUNT IN CASE 409 FAILS TO CHARGE A CRIMINAL OFFENCE AS THE OBJECT OF THE CONSPIRACY.

Common law writers define conspiracy to be a combination of two or more persons to accomplish some *criminal* object, or some indifferent object by *criminal means.*

But we are dealing now with conspiracy under the law of the United States, which is more limited than at common law.

§ 5,240 (R. S. U. S. 1878) is in these words: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose; and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable, etc."

It will be admitted that this count charges no conspiracy to defraud the United States in any manner or for any pur-

pose. Unless, therefore, it charges a conspiracy to commit a *criminal offence* against the United States, that is, to violate a *criminal statute* of the United States, the count is bad. This has been decided in the *United States vs. Cruikshank*, 92 U. S. R. p. 558. It was there settled as the law of this Court that conspiracy to defraud or injure another person than the United States, or to commit an offence at common law, or an offence under State laws, the same not being criminal under the laws of the United States, is not indictable in the Federal Courts.

The supposed criminal offence here is causing and procuring the declaration of a dividend without net profits on hand at the time out of which to pay it; and § 5,209 R. S. of the R. S. 1878, is supposed to make that a criminal offence.

§ 5,209 is in these words:

"Every president, teller, cashier, clerk or agent of any association who *embezzles*, *abstracts* or *wilfully misapplies* any of the moneys, funds or credits of the association; or who without authority from the directors, issues or puts in circulation any of the notes of the association; or who without such authority, issues or puts forth any certificate of deposit; draws any order or bill of exchange, mortgage, judgment or decree; or who makes any false entry, report or statement of the association with intent, *in either case*, to injure and defraud the association or any other company, body politic or corporate or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of such association; and every person, who with like intent, aids or abets any officer, clerk or agent in any violation of this section shall be guilty of a misdemeanor, &c."

There is nothing in § 5,209 about causing or procuring the declaration of a dividend. But it is contended that the word "misapplies" covers that case.

The question then arises what is the meaning of this word. Has it a limited or unlimited meaning? The gov-

ernment claims for this word a breadth of meaning which will cover every act of a director, no matter when done or in what capacity by which the bank shall sustain a loss. The defendant, on the contrary, insists that the word has a more limited meaning, and that it embraces only acts of a ministerial nature, and in respect to which the actor has to perform a defined and positive duty, and not a conditional one, dependent upon the necessity of investigation, deliberation and the exercise of one's best judgment.

We need not deny the power of the Legislature to punish errors committed in the exercise of judicial or *quasi* judicial functions; but such legislative intention is not to be presumed; must not rest on mere inference, but must be clearly expressed. The declaration of a bank dividend is a deliberate act.

It demands the exercise of great care, financial skill and judgment. In case of a National Bank the director is required to ascertain what losses the bank has sustained, often a most difficult question. (§ 5204.) Let us suppose no more than is true, the matter of declaring a dividend may involve transactions covering hundreds of items and hundreds of thousands of dollars. The questions depend upon a multiplicity of facts to be ascertained; many of which can not be ascertained with certainty or can not be ascertained at all. They involve inquiries into the solvency of men, the value of securities, the amount of property the representations of agents. When the director has settled the questions of loss he must then ascertain the "undivided profits" by processes equally intricate and difficult; then follows the enquiry into bad debts. And after this he must resolve the problem of net profits; and then how much of the "net profits" appertain to the "preceeding half year." § 5204. We will say it is absolutely impossible to reach an accurate conclusion in such matters. The most that can be done is to approximate the truth. Now is it to be believed that the law-makers intended by §5209, to punish a director by fine and imprisonment for an

error in such a matter. It is not the spirit of our criminal code to define criminal offence by vague and indefinite terms If this be the meaning of the statute there is not one act referred to the deliberative judgment of a director for which should a loss occur, he might not be subjected to a charge of fraud and an indictment. The general course of the banking business is well known. It is a matter of general knowledge that the details of the business are in the hands of cashiers, tellers, clerks and bookkeepers. The directors do not and can not superintend details. They must rely upon the statements of these executive officials; and therefore, the law requires them to account to each other, and the protection of the bank consists of bonds and sureties to be provided by these officials. The National Banking act does not impose upon the directors the duties of cashier, tellers and bookkeepers. It requires no bonds of president or directors, yet it authorizes the directors to make a dividend every six months. We verily believe that if no dividend can be safely made until each director has settled every question by his own personal investigation on which its propriety depends, it could not be done in the six months.

We concede the power of the Legislature to impose upon the directors of a bank all the duties of cashiers, tellers and bookkeepers. We concede the Legislative power to punish them for not discharging all these duties. We deny that the National Banking act has imposed such duties. We deny that the National Banking act has made it a crime in a director not to discharge these duties. If such was the intention, it would have been positively expressed. There is no such expression. § 5209 has not made the procuring a dividend under any circumstances a criminal offence in a director, and therefore, it is not "an offence against the United States."

This question was considered in 12 Iredell 172, *State vs. Williams*, and it was ruled as follows: "When a public law imposes a public duty, the omission to perform the

duty is indictable. But if it be not an absolute duty but a conditional one, dependent upon the honest exercise of the judgment of the person or persons to whom it is submitted, whether to be performed or not, it is not *per se* an indictable offence."

This is the principle involved.

The causing or procuring the declaration of a dividend is not declared a criminal offence in terms, and the words of the statute must not be extended by implication. 2 Dillon 219, *United States vs. Clayton;* 9 Gray 127, *Com. vs. Prieus;* 2 Story 205, *Andrews vs. United States;* 2 Curtis 502, *Stinson vs. Pond.*

SECOND. THE WORDS "EMBEZZLE, ABSTRACT AND WILFULLY MISAPPLY" COVER ONLY ACTS OF MINISTERIAL DUTY, AND NOT THOSE OF DELIBERATION AND JUDGMENT.

(1) *As to the words "wilfully misapplies."*

These words indicate a specific personal trust, and mean that the moneys, funds or credits in question, have come to the actual physical possession of the president, director, teller, cashier, clerk or agent," to be applied by him in a certain specified way.

How can one who has no possession of these things either apply them according to duty or misapply them contrary to duty? But the expression of the statute is stronger.

The statute intends to punish one who *wilfully* misapplies. This signifies that the moneys are to be applied or misapplied *in the pleasure* of the officer or agent, that the application is dependent *wholly on his will;* so entirely that he needs the consent of no other person. Such being the case it is repugnant to the statute to charge the defendant with *wilfully* misapplying moneys, funds or credits of the bank *by procuring an order of the board of directors*, to allow it to be done.

If the misapplication charged upon the defendants could

not be accomplished without the order of the board of directors, then it would be the wilful act of the board and not the wilful act of the defendants. It could not be the *will* of the defendants which effected it, because they had no will of their own which could do it. It is illogical to charge as a *wilful* act against A that which A cannot possibly do without the consent of B. C. D. and E.

The prosecutor felt the force of this, and therefore averred not that the defendants conspired simply to misapply moneys, etc in their possession, but conspired to cause and procure an order of the board to enable them to reach the moneys with intent to misapply them afterwards. It was held, 4 Dillon, p. 145, *United States vs. Crafton*, that an indictment for conspiracy to commit a fraud *by procuring an act of Congress* to effect it would not lie.

It has been claimed that the National Banking act places all the moneys, funds and credits of the bank in the physical *possession* of the directors. But this is a mistake. The same moneys can not be in the physical possession at the same time of the cashiers and tellers and also of the directors.

§ 5136 of the act empowers the bank to "elect and appoint directors, and by its board of directors appoint a president, vice-president, cashier and other officers, *define their duties*, and require bonds of them, fix the penalty thereof, dismiss such officers, or any of them at pleasure, and appoint others to fill their places."

The act nowhere gives the directors personal possession of the moneys, funds or credits of the bank. It no where authorizes them to assume such possession. Nor is it charged in the count that the defendants or either of them *had such possession in fact*. What is not averred does not exist.

2 Arch., Cr. Pr. & Pl., 1336. 2 Grant Pa. C., 385, *Com. vs. Means*.

If the defendants had been put in possession of the moneys of the bank as directors, cashiers, tellers or agents,

with instructions to apply the same in some certain specified way, a charge of misapplication might be rationally predicted on a refusal or failure to apply as directed. But when a party has no duty to apply, he can not be guilty of misapplying. He may commit a larceney, a robbery, a trespass or a fraud, but he cannot be said to misapply them. Misapplication cannot be predicated of a tortuous profession. When A and B conspire to take unlawful possession of the property of C, and go to his coffer and break it open and carry off his gold and convert it to their own use, the case is not one of misapplication.

Now if we consider that the statute intends only to punish for wilful misapplication those officers and agents who have been entrusted with the legal possession of the funds of the bank, so that the funds are subject to their will, for application these difficulties disappear.

(2.) *As to the word "embezzle."*

There are numerous statutes of the States prescribing punishment for the crime of embezzlement. There are statutes of the United States for the same purpose.

Some of these statutes simply declare that whoever commits the crime of embezzelment, without defining it, shall be punished. Others declare that whoever converts to his own use, with intent to defraud, moneys or effects entrusted to his possession by the owner, shall be deemed guilty of embezzlement and be punished, &c, But in all cases, without regard to the form of the statute, all courts have held that the word "embezzle." implies that the legal possession of the moneys or securities had been entrusted to the offender prior to the act of embezzlement. That possession and trust in the embezzler are essential elements of the crime, and these facts must be expressly averred in the indictment.

8 Met. (Mass.) 247, Com. vs Wyman.
31 Cal., 108, ex. p. Hedly.
See specially, 4 Carr & Payne, 390.

Rex vs. Snowey.
Rex vs. Hawtin, 7 Carr & Payne, 281.
97 Mass., 584, Com. vs. O'Malley.

In 21 Texas 775, State vs. Johnson, a clerk who had no legal possession of the moneys of the institution, but took possession of its moneys and converted them to his own use, was held not guilty of embezzlement, because the money did not come to his possession by virtue of his employment.

In Com. vs. Barry Thompson's Nat. Bank Cases, p. 605-610, the case was this: The teller was entrusted with moneys of the bank during the day, but at night this trust ceased, and the moneys in his hands were turned over by him to the cashier, and locked up in the safe.

But the teller went in the night, opened the safe, took out the moneys and converted them to his own use. This was held larceny and not embezzlement.

See also,

Rex. vs. Hawtin, 7 Car & Payne, 281.
Com. vs. Davis, 104 Mass. 548.
U. S. vs. Hutchinson, 4 Pa. Law J. R., p. 365.

In 7 Pa. Law J. R., United States vs. Hutchinson, it is said no one can be convicted of embezzlement under the acts of Congress 1841 and 1846, unless he has been entrusted with the legal possession of the public moneys

In 2nd Arch. Cr. Pr.& Pl. 1357, 8th ed., it is said: "If the clerk of a banker or shopman of a draper, receive money from a customer, and instead of putting it into the drawer or till put it into his own pocket and appropriate it, he is guilty of embezzlement But if he receive it and put it into the till or drawer, and then take it out, he is guilty of larceny."

Griffen vs. State, 4 Tex. Court Ap. R., 406, is a well-considered case and states the rule clearly.

These authorities show that the defendants as directors had no possession of the moneys of the bank to make it

possible for either or both of them to embezzle or wilfully misapply them.

(3.) *As to the word "abstract."*

This word strongly maintains the same view of the legal meaning of § 5209.

Strange to tell, it is not defined in any law dictionary. In a popular sense it means "to take from." But this is no legal definition: for it would apply equally to embezzlement, larceny, robbery, trover and trespass. In criminal law it has a precise and specific office, to-wit: to describe the act by which one who has been entrusted with a bale, package, bundle or lot of valuables, for a certain purpose, breaks the package, or bale, etc., and takes from it (abstracts) part of the contents with criminal intent.

Webster defines it "to take secretly for one's own use *from* the property of another when placed in one's power." That is to say, to abstract means to appropriate a part and not the whole of another's goods confided to the possession of the abstractor.

Worcester says it means "to abstract money or goods from a parcel."

When we consult the adjudicated cases, there is no difficulty in understanding the effect of the word.

In 7 C. & Payne, 151, Rex. vs. Jones, the prisoner was asked by the prosecutor to take a letter containing money to the post. The prisoner received the letter, broke it open, and *abstracted* the money,—and was held guilty of larceny.

In 9 C. & Payne, 38, Rex. vs Jenkins, the prisoner was intrusted by the owner with a letter containing notes to be carried to the coach office. The prisoner broke the letter and *abstracted* the notes, and was convicted of larceny.

29 Conn., 47, State vs. Fairclough, when a carrier breaks a package entrusted to him and *abstracts* the contents *animo furandi*, the offence is larceny.

8 Leigh, 743, *Walker's* case. The prisoner had access to

and control of the cash of his employer, and received and took care of his moneys, and abstracted portions thereof and appropriated them to his own use. Held larceny

In 4 C. & Payne, 545, Rex. vs Fletcher, a carrier to whom a package has been entrusted, will not be guilty of larceny in respect thereto, unless he breaks the package and takes from it (abstracts) a portion of the contents.

5 C. & Payne, 533, Rex. vs. Pratlers. If a bale of merchandise is delivered to a carrier, and he go away with the whole bale, this is no felony, but if he break the bale and take out (abstract) anything *animo furandi*, it is larceny.

In 4 Mass., 580, Com. vs. Brown, the case was this: Brown received a wagon-load of packages for carriage, and separated (abstracted) from the mass a portion of the packages and converted them to his own use, and was convicted of larceny.

See 9 Bush. (Ky.) 609, Shakers vs. Underwood.
17 N. Y., 114, Nicholls v. People,
3 Pitt L. J., 405, U. S. v. Cummings,
6 McLean 342, U. S. v. Whitaker,
—all cases of abstraction from property in possession of the offender.

3 Edw. C., 583, Pascoag Bank v. Hunt, abstraction by cashier of moneys in his hands.

In the matter of Van Campen, Thompson's N. B cases, 188, Blatchford, J., said: "Where the president of a bank, charged as a trustee with the administration of the funds of the bank," *in his hands*, converts them to his own use, he "embezzles and *abstracts* them within the statute."

Here we see that "abstract" and "embezzle" are used as synonymous terms. The important feature to be noted is that the moneys were "in his hands," in his possession.

In all these cases, had the whole package or bale been taken away and converted to the use of the person to whom it was entrusted, the offence would have been embezzlement; the abstraction alone converted the offence into

larceny. The reason is this: In larceny the original taking must be unlawful. But in these cases the original taking was by consent of the owner, and therefore lawful. In order to make the case one of larceny, the courts held that the *breaking* and *abstracting* were unlawful acts, and determined the bailment, and were proof that the original receipt of the property or money was with intent to steal.

9 Yerger, 198., Hit vs. State.
15 S. & R., 33 , Lewis vs. Com.

The statute, 24 and 25 Vict., c. 96, § 3, changed the law. It is as follows: "Whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, *though he shall not break bulk*, or otherwise determine the bailment, shall be guilty of larceny."

2 Russell on Crimes, top p. 246, (9th ed.)

It would have been more sensible, we think, to have made the conversion of the package, etc., in whole or in part, broken or not broken, embezzlement.

Our Missouri statutes sunk the question of *abstraction* by calling it embezzlement and punishing it as larceny. It says: "If any carrier or other bailee shall *embezzle* or convert to his own use, make away with or secrete, with intent to embezzle * * * any money, goods, etc., * * * * * which shall have been *delivered to him*, or shall have come *into his possession*, or under his care as such bailee, *although he shall not break any trunk, package, box* or *other thing*, in which he received them, he shall, on conviction, be punished in the manner prescribed by law for stealing property of the nature and value of the articles so *embezzled*, taken or secreted."

1 Wag. Stat., 1872, p. 459, § 37.

The word "abstract," in the criminal law, has no application except in respect of money or property entrusted to

the possession of the abstractor. It is never used in the sense of steal, or to describe a larceny.

Our Missouri statute, just quoted, declares that breaking a package or trunk, etc,, and abstracting contents, is embezzlement.

Many other statutes do the same.

In § 5,209 it is used to describe embezzlement.

It is the companion of "embezzle" and "misapply." "*Noscitur a sociis.*"

The word abstract has not been employed in the indictment under consideration, and is only referred to to show it is in harmony with the other words, "embezzle" and "misapply," and was intended to describe a phase of embezzlement, and that, like "embezzle" and "misapply," it never indicates an original unlawful taking.

THIRD. THE WORDS EMBEZZLE, ABSTRACT AND WILFULLY MISAPPLY ARE INTENDED TO DESCRIBE THE OFFENCE OF EMBEZZLEMENT.

These words each specify a different sort of wrong committed upon *a lawful possession* of another's property. We may say they all mean embezzlement, and are used to specify a different mode of embezzlement, just as shoot, cut, stab, drown and poison, each describe a different mode of murder.

The word "apply" and the offence of "misapplying," are found, in the criminal statutes of the United States, defining and punishing embezzlement, when committed by public officers and agents in not using money and property lawfully entrusted to him, as directed by law.

Thus, § 5,488 (R. S. U. S. of 1878) punishes a disbursing officer as guilty of *embezzlement* who fails to *apply* moneys entrusted to his hands according to law; that is who *misapplies* them.

§ 5,497 punishes other acts as acts of embezzlement, in

bankers, brokers, presidents, cashiers, tellers, and bank officers, who *knowingly apply* public moneys *coming to their hands* for any purpose not prescribed by law. We insist that these statutes conclusively determine that the words "apply" and "misapply" are descriptive of a form of embezzlement. They say substantially that one who "misapplies" embezzles.

§ 5,490 makes it embezzlement in every custodian of public moneys, charged by law to safely keep and disburse them, to use, loan or deposit them in unauthorized places, that is to "misapply" them. The word "apply" is not used in § 5,490, but the idea is the same. The effect of this section is to declare substantially that "misapplying" of the public money is embezzment.

§§ 5,491, 5,492 and 5,495 are equally stringent.

See §§ 5,486, 5,489, 5,504, in which the word apply is not used, but in which terms of the same import are used to show that the failure of officials holding moneys by virtue of their offices, to *apply* the same according to law is an act of embezzlement.

These words, "apply" and "misapply," are of modern use in criminal statutes. They were introduced to describe more amply the offence of embezzlement. The old form was to charge the embezzler with "converting to his own use" money or property entrusted to him; but when he did not convert to his own use, but made other dispositions equally injurious to the owner, it became necessary to adopt another expression to meet the case. The words "fraudulent disposition," or "fraudulent misapplication," or words of similar import then appeared. They were found in the criminal code of the United States, especially to punish acts of misuse of public moneys and property in public officers and agents who were required to receive and disburse them according to law.

But the offence of misapplying,, has never been made to cover any case in which the money or property had not been

entrusted to the possession of the offender by virtue of his office or employment.

It is a familiar rule that statutes *in pari materia* should be construed together. By force of this rule, we claim that the words "misapply" and "apply" can have no other meaning in the National Banking Act than they have in other statutes of the United States, where they are always used to show a misuse of a lawful possession, and never to describe the act of procuring a fraudulent possession. They cannot have two meanings.

In 42 Texas, p. 62, State vs. Brooks, the defendant, a receiver of public moneys, was convicted of *embezzlement* for fraudulently *misapplying* public moneys received by him by virtue of his office.

In 6 Wall. 392, United States vs. Hartwell, the defendant was convicted of embezzlement on an indictment alleging that having the *legal charge* of public moneys he applied a portion of them contrary to law.

FOURTH. THE WORDS APPLY AND MISAPPLY HAVE THE SAME MEANING IN BRITISH STATUTES WHICH WE CLAIM FOR THEM.

See 7 and 8 Geo. 4., Ch. 29, § 49, in which the failure of any merchant, broker, banker, attorney, or agent to *apply* moneys or securities entrusted to him *to be applied* according to written directions, is declared to be an act of *embezzlement*.

The act of 24 and 25 Vic., Ch. 96, § 71, says: "For preventing difficulties in the prosecution of offenders in any case of *embezzlement*, fraudulent *application* or *disposition*, hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender, for any number of distinct acts of embezzlement, or fraudulent *application* or *disposition* not exceeding three * * * and in every indictment, where the offence shall relate to any

money or valuable security, it shall be sufficient to allege the *embezzlement* or fraudulent *application* or *disposition* to be of money, without specifying any particular coin or valuable security, and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have *fraudulently applied* or *disposed* of any amount, though the particular species of coin or valuable security of which such amount was composed shall not be proved; or, if he shall be proved to have embezzled or *fraudulently applied* or *disposed* of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security *may have been delivered* to him, in order that some part of the value thereof should be returned to the party *delivering* the same, or to some other person, and such part shall have been returned accordingly."

2 Russell, Crimes, p. 413–414, 9th ed.

It is important to notice here that, although the fraudulent *disposition* or *misapplication* is not called embezzlement by this statute, yet it is strictly confined to moneys, and securities entrusted to the legal possession of the offender. And this is the ruling of the English courts.

In 13 Cox Crim Law Cases, Part II., p. 57, Rex vs. Graham, the defendant was convicted of embezzlement, for fraudulently "*misapplying*" money entrusted to him. The court said the misapplication is an incident of the *embezzlement*.

On page 49, Part II., same book, Rex vs. Hall the prisoner was indicted for embezzlement by *misappropriation*, and acquitted, because the moneys *had not been entrusted to his possession*.

See same book, p.——,Regina vs. Cooper, Part III., where is an indictment for negotiating bills by defendant contrary to the directions with which they were delivered to him.

1 Crown Cas. Res'd., p. 113.

2 Arch. Cr. Pr. & Pl., p. 1362, has the form of an indict-

ment, charging that the defendant, a person employed in her majesty's public service, and being *by virtue of such his employment entrusted* with the receipt, custody, management and control of money of her majesty, feloniously did embezzle certain moneys of her majesty, parcel of said money of which he then had the custody, etc., and did fraudulently and feloniously *apply and dispose* of the same, to his own use and benefit. That is according to this precedent, a "fraudulent missapplication," is embezzlement.

The author adds: To maintain the indictment, it is necessary to prove (1) that the defendant exercised the office mentioned in the indictment; and (2) that by virtue of his office or employment, he was entrusted with the receipt, custody, management or control of the money, chattels or valuable security which he embezzled.

In Com. vs. Wyman, 8 Met , 247, the indictment charged that Wm. Wyman, director and president, and Wm. Brown, director and cashier of the Phœnix Bank, did by virtue of their respective offices and employment, have, receive and take into their possession, the moneys alleged to have been embezzled. See Wharton's Am. Criminal Law, 5th Revised Ed.

6 Wall., 392, U. S. vs. Hartwell.

If it could be made out that, under our laws, "fraudulent misapplication" is a different offence from embezzlement, it would not help the first count of this indictment, because the possession of the money or property alleged to be misapplied, is always as essential to the offence of misapplication as to that of embezzlement.

It is certain (1) that fraudulent misapplications are never treated of by text-writers except under the title of embezzlement, and as an incident of embezzlement; (2) that no one has ever been convicted of embezzlement or fraudulent misapplication unless the money or property embezzled or misapplied had been previously entrusted to his personal possession; (3) it appears that §5,209 has always been

assigned by compilations of U. S. Statutes to the head of Embezzlement.

"In general," says Mr. Talford, in his late edition of Dickenson's Quarter Session, "if a public officer *misapplies* funds with which *he is intrusted* for the benefit of the public, he may be indicted for misdemeanor."

Wharton Am. Crim. Law, p. 687. Title—EMBEZZLEMENT.

Taintor, the cashier of the Atlantic National Bank, was indicted and convicted for "*embezzling, abstracting, and wilfully appropriating the moneys and funds of the bank with intent to injure and defraud the association.*" Thompson's National Bank cases, p. 256. The case is an authority for our proposition that "wilfully misapplies," in § 5209 means "embezzles" and "embezzles" means "wilfully misapplies."

The case does not give the language of the indictment, but the court certainly did not understand that two different offences were charged in the same count.

The second paragraph of section 5209 is conclusive to our minds that the words "wilfully misapplies" have the narrow technical meaning for which we contend. If these words have the broader meaning claimed by the government, all that the latter part of the section contains about putting in circulation notes, certificates of deposit, bills of exchange, bonds, drafts, mortgages, judgments, decrees and false entries, is superfluous.

FIFTH THE TRUE READING OF § 5,209.

In view of these reflections we hold that § 5,209 might be well read in this way: Every president, director, teller, cashier, clerk or agent of any association, who embezzles or abstracts secretly for his own use, any portion of the moneys, funds or credits of the bank entrusted to his posses-

sion, or wilfully applies the same or any part thereof to his own use, or to any purpose not prescribed by the authority of the association, with intent, &c., shall be deemed guilty of embezzlement, &c.

This reading would present the true meaning of the statute.

When so understood there is nothing in it to make it a crime in any officer or agent to procure an order of the board declaring a dividend. Such an act is not a misapplication of the moneys, funds or credits of the bank in the meaning of the statute. It was no part of the object of § 5,209 to punish larceny or robbery; that was done by other statutes.

This count then is defective in assuming that the averment that defendants were directors and one of them President and the other Vice-President of the bank is tantamount to an allegation that the moneys of the bank were entrusted to their lawful possession.

If the defendants, having no more authority to employ the moneys of the bank than appertained to the offices of directors, president and vice-president, took its moneys *animo furandi*, the offence would be larceny. If they took and used them to the injury of the bank, without felonious intent, the case would be one of civil injury. But no charge of conspiracy lies for a civil injury.

9 N. J. L. R., 293, State vs. Rickey.

SIXTH. THE DEFENDANTS AS PRESIDENT AND VICE-PRESIDENT AND DIRECTORS, HAD NO LEGAL POSSESSION OF THE MONEYS OF THE BANK.

Morse on Banks, p. 128, says: "The authority inherent in the office [of President] itself is very small." P. 129, "A careful collection of adjudicated cases * * is not very favorable to the assumption of *any* species of executive power by a bank president without direct authorization."

"It is a singular fact that the entire collection of judicial authorities justifies the enunciation of *only one act as falling within the properly inherent power of the president.* This *solitary* function is to take charge of the litigation of the bank." P. 132, "The control of the president of a bank over its property * * is of the slightest." "He has no power to draw checks in its behalf or against its funds." "He is not the executive officer who has charge of its moneyed operations." "It is not among his functions to withdraw or remove its deposited funds or to use them for any purpose whatever." "He has no more power of management or disposal over the property of the corporation than any other single member of the board." See 7 Ala., 28, Gibson vs. Goldthwaite.

1 Saxton, 541, Leggett vs. N. J. Bank.
5 N. Y., 320, Hoyt vs. Thompson.
11 Mass., 94, Spear vs. Ladd.
11 Mass., 288, Nat. Bank vs. People.
4 Denio, 299, Austin vs. Donnelly.
7 How (Miss.) 203, Harper vs. Calhoun.
12 Me., 354, Crain vs. Bangor, etc.
4 Paige, 127, Fulton Bank vs. Sharon.
1 Selden, 320, Hoyt vs. Thompson.
7 Grattan, 352, U. S. Mining Co.
14 Wis., 325, Walworth vs. Farmers, &c.

2 Pa. St., 318, Farmers Bank vs. McKee, the power of the President to do an act must appear by the charter or by-laws.

In 1 Cush., 507, Achnelot, &c., vs. Marsh, it was denied that the President had power to commence a suit without a special authorization from the board.

A National Bank President is not excepted from this rule.

The National Banking Act gives him no power whatever.

§ 5,134 vests the whole power of the bank in "its board of directors."

The board is to appoint all the officers "*and define their duties.*"

There is an averment in the count that Britton was President and Bates Vice-President, but no averment that any duties were ever assigned to either. Therefore, neither of them could exercise any power except such as may be found in the common law. We have seen what that is in Morse on Banking.

The doctrine laid down by Morse has been broadly affirmed in 22 Grattan 51, Hodge vs. National Bank. It is there decided that unless further duties are expressly conferred on the president by the board of directors, *he has no power whatever* except to represent the bank in its litigation.

It is therefore perfectly certain that J. H. Britton, President and Director, and Barton Bates, Vice-President and Director of the bank, as such, have never had any legal possession of the moneys of the bank.

On the contrary they have been, *as such*, as absolute strangers to such possession as if they had no position in the bank. The consequence is that no charge of embezzelment by "misapplying" or otherwise, can lie against them. The board of directors, when assembled as an administrative body, has power and control over the money and effects of the bank, but no possession.

SEVENTH. AN EXAMINATION OF THE WHOLE NATIONAL BANK ACT WILL SHOW THAT § 5,209 CAN NOT HAVE THE EFFECT CLAIMED FOR IT IN THIS COUNT.

If § 5,209 is confined to wilful misapplication by officers and agents of moneys, etc., entrusted to their legal possession and control, we shall have some rational limit to the scope of the statute. But if it is held to cover the case in this count set forth, we shall have no limit at all. If, when

a director, by his advice and influence, favors the declaration of a dividend, he may thereby be made guilty of a criminal misapplication of the moneys of the bank distributed in payment of the dividend, there is no reason why the principle should not run through the entire act.

The effect of this would be to make many things crimes not heretofore so considered, certainly not even hinted at in the banking act.

Thus, § 5,199 requires the directors, before declaring a dividend, to carry one-tenth of the net profits of the preceding half year to its surplus fund, until it shall amount to twenty per centum of the capital stock.

A violation of this section might occur by an error as to what was net profits, or what were net profits belonging to the preceding half year.

And so, also, a loan to one person or company exceeding one-tenth of the capital, as in § 5,200; a loan or discount on the security of shares of the bank, as in § 5,201; the creation of a debt in the manner prohibited in § 5,202; a pledge of the bank notes as in § 5,203; any impairment of the capital, as in § 5,204, would be crimes in every officer and agent who should assent to the same.

In fact the whole deliberative administration of the affairs of the bank, would be drawn into the penal clauses of § 5,209, and no act could be done except at the hazard of fine and imprisonment.

Indeed, we do not see why, if the directors should discount a bill on insufficient security, they might not be charged with a conspiracy to misapply funds of the bank. Such an act would be as much a wilful misapplying of the funds of the bank, as that for which the present defendants are indicted. Surely this is not the meaning of the statute. The consequences of such a construction are monstrous.

No one who ever consented to act as a director, officer or agent of a National Bank, could have so considered it. Such construction as this would be, is not only unreasona-

ble, but is believed to be without example. We have never known of any attempt so to construe the words "misapply" or "misapplication."

The course of legislation is all the other way. When Legislatures have seen fit to punish an improper declaration of a dividend, they have done it in express terms.

Take for instance the Michigan Statute. It is in these words:

"If the directors of any corporation, organized under this act, shall declare and pay any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be severally liable to a penalty of five hundred dollars" [Thompson on Liability of Officers and Agents of Corporations, 585.] Or that of Georgia, viz.:

"No joint stock corporation, body corporate, or other association, shall declare any dividend * * * or distribute any money among its members or profits, when such dividend, dividends or money are not the legitimate proceeds of its investments, and any president, director, officer or agent * * * violating this section shall be guilty of a misdemeanor." (Same book, 555).

Similar enactments have been made in California, Connecticut, Florida and Minnesota, evidently because the pre-existing statutes against embezzlement were deemed not sufficient.

Compiled Laws Michigan, 1871, § 7,587, embezzlement by misapplication. For punishment of false dividend, § 2,479.

Penal Code California of 1874, embezzlement by misapplication, p. 196, § 504. False dividend, p. 211, § 559.

Gen. Stat. Connecticut 1875, embezzlement by misapplication, p. 524, § 1. False dividend, p. 286, § 4.

That every violation of a provision of the National Banking Act resulting in loss to the bank, is not a criminal misapplication of the moneys of the bank, has been repeatedly decided.

In *Shoemaker vs. The National Mechanic's Bank*, Thompson's Nat. Bank C., 169, the question was whether a loan made by the bank in violation of § 5,200, to one person, firm or company, in excess of 1/10 of its capital stock paid in, was within any penal clause of the act. It was held not to be, and that the banking act contained no penalty for a violation of that section beyond forfeiture of the bank charter and a personal liability of the officers to pay damages. See also *Ohio vs. Bank of Titusville*,, where it was said that § 5,200 was merely directory to the bank. [Thompson Nat. Bank Cases, p. 871; *Union Nat. Bank vs. Matthews*, 98 U. S., 621,] and had no personal effect.

It is a principle of the common law that no civil action can arise from a criminal offence. But in all the cases that have arisen from National Bank loans in excess of one-tenth of the bank capital, or on real estate security, no lawyer and no judge has ever supposed that such a transaction was made criminal by § 5,209. If it had been found that such a loan was a criminal misapplication of the funds of the banks, the rulings must have been against the banks.

EIGHTH. IF, AS WE CONTEND, THERE IS NO SUCH CRIME AS MISAPPLYING THE MONEYS OR FUNDS OF THE BANK BY PROCURING A DIVIDEND; THERE CAN BE NO SUCH THING AS A CONSPIRACY TO COMMIT SUCH A CRIME.

A criminal conspiracy must be to cheat and defraud some one in a mode made criminal by statute. All cheats and frauds have not been so made criminal.

92 U. S. Rep., 558, U. S. vs. Cruikshanks.
4 Dillon, 147, U. S. vs. Crafton.

NINTH. THE FIRST COUNT FAILS TO CHARGE THERE WERE NO NET PROFITS TO MAKE THE DIVIDEND.

It states only that June 30, 1876, there were no net

profits then on hand *amounting to $87,500.* For aught that appears the whole amount of $87,500 net profits was on hand to *make* the dividend July 10th. The pleading, therefore, is uncertain. But the pleading is frivolous and tenders no substantial issue for trial.

It does not say how much net profits were on hand. It may be the amount was $87,499.99. Under this count the defendants must be convicted if one cent of the amount was lacking. The pleading is bad for uncertainty. 59 Ala., 73, *Noble vs. The State;* 62 Mo., 40, *State vs. Reaky;* 48 Mo., 93, *State vs. Holden;* 3 Cranch, C. C., 56; 6 Ark., 155, *State vs. Hand;* 5 Dillon, 58, *United States vs. Walsh.* The count should have followed the statute and alleged there were no net profits

TENTH. THERE IS NO SUFFICIENT AVERMENT OF THE INTENT TO FRAUD.

There is a *general* averment of intent to injure and defraud. But this is directly followed by a *restrictive* averment that the fraud was only this: "Which dividend * * was to be false and fraudulent in this, viz: that there were on said 30th day of June on hand, in the moneys and funds of said association, no net profits *amounting to $87,500.*" This is not sufficient. If the full amount was not on hand June 30th, we must assume it was on hand July 10th, and there was no fraudulent intent. The count has a further defect.

The count says defendants conspired to wilfully misapply $87,500 of the moneys and funds of the association by procuring the directors to declare and pay that amount as and for a dividend of net profits "*in the moneys and funds of said association.*" This averment is made under a misconception of the statute. A dividend cannot be declared out of the "*moneys and funds of the association,*" but must be

declared out of the net profits, and these exist in the entire assets of the association. The assets of the association consist of its moneys, funds and *credits*. [See § 5,209.] What are these? We know what moneys are. They are coins of gold, silver or copper, bank notes and bills of credit issued by public authority. What are "funds"?

In common acceptation the word is sometimes used as including moneys and means generally. It is not so used in Section 5,209. The section designates three classes of assets belonging to the bank, viz: "moneys", "funds" and "credits". Each of these terms must necessarily have a meaning of its own. "Funds" are distinguished by the statute from the "moneys" and "credits", and of course was intended to describe a portion of the assets of the bank not included in either.

Webster (Dic.) defines "funds" to be a stock or capital, a sum of money *appropriated* as the foundation of some commercial or other operations, etc., as money lent to government, national debt, etc. Worcester (Dic.) says it is an *established* stock, or capital out of which supplies are drawn, as "public fund," "sinking fund." This must be the sense in which the word is used in the statute. It can be used in no other sense if we retain the statutory distinctions.

It was manifestly meant to designate as the funds of the bank— its United States registered bonds, notes of circulation, lawful money reserves, surplus fund, and unsold capital stock, if any.

The term "credits" embraces all other assets of the bank not covered by the terms "moneys" and "funds." "Moneys, funds and credits" consequently include everything belonging to the bank. (§ 5,209.) The *profits* of a national bank, gross or net, are distributed through its whole assets. They cannot be located in any particular class of these assets. They are not found specially in its "moneys" or "funds" or in both, but are found generally in its moneys, funds and credits.

When, therefore, the count avers that June 30, 1876, there were no net profits in the "*moneys and funds*" of the bank, leaving out of the account all its "*credits*," it does not aver that there were no net profits of the bank out of which to declare or pay a dividend. We have been curious enough to enquire what was the value of the real estate of the bank, June 30, 1876, and ascertained that it was not less than $175,000, and that at the same date, the other credits of the bank amounted to not less in gross than $2,000,000. The count is bad because it does not show any violation of the statute; does not bring defendants within the terms of the statute.

The pleader might as well have charged defendants with conspiring to misapply the moneys of the bank by declaring a dividend as of net profits *in the real estate* of the bank; averring there were no net profits *in the real estate*.

§ 5,204 provides that no dividend shall ever be made by any association * * to an amount greater than its net profits then on hand. The pleader should have followed the statute and charged simply that there were no net profits of the association. On the contrary he has departed both from the letter and meaning of the statute and employed terms of his own which do not express the meaning of the statute.

If an averment that there were no net profits in the moneys and funds is good, though "credits" has been designated by the law as a separate class of the assets, why would not an averment that there were no net profits in the moneys and credits be also good, leaving out the fnnds, and why might not the pleader have charged there were no net profits in the moneys of the bank, leaving out both funds and credits?

The count is bad: (1) because there is no such criminal offence as wilfully misapplying money and funds not entrusted to defendants and in their lawful possession.

(2) There is no such criminal offence as procuring or causing an order for a dividend greater or less than the

net profits on hand. (3) It is not charged that there were no net profits out of which to pay such dividend July 10, 1876. (4) It is not charged that there were no net profits on hand June 30, 1876. (5) There is no averment that the dividend was without net profits to pay it when it was to be paid.

Now, taking all to be true as stated, it constituted no violation of the statute. § 5,204 declares that "no dividend shall ever be *made* by any association while it continues its banking operations to an amount greater than its net profits."

(6) The indictment does not charge a conspiracy to *make* a dividend July 10, 1876, without net profits then on hand.

It does not follow the words of the statute, and does not aver the defendants conspired to violate the statute.

ELEVENTH. THE SECOND COUNT OF SAID INDICTMENT IS BAD.

All the objections urged against the first count are applicable to the second.

TWELFTH. THE SECOND COUNT IS BAD BECAUSE IT DOES NOT AVER THAT THE DIVIDEND EXCEEDED THE NET PROFITS ON HAND.

§ 5,204 provides that "no dividend shall ever be *made* * * * to an amount greater than the net profits then on hand."

This second count avers *not* that the dividend declared exceeded in amount the net profits on hand; but that the amount of *bad debts* exceeded the amount of net profits on hand! It is a curious departure from the terms of the statute. Suppose the undivided or gross profits were $100,000, and the bad debts were $60,000. Subtract the amount

of bad debts from the gross profits and you have, net profits, $40,000. The fact, therefore, that the bad debts in amount exceed the amount of net profits *is immaterial.*

UNITED STATES vs. JAMES H. BRITTON AND BARTON BATES.
[Case No. 410.]

Brief of argument in support of the demurrer to indictment in Case No. 410.

BY GLOVER & SHEPLEY,
Attorneys for Plaintiffs.

FIRST. ALL THE COUNTS OF THIS INDICTMENT ARE BAD BECAUSE EACH ONE OF THEM ADMITS NET PROFITS ON HAND TO PAY THE DIVIDEND.

If we concede it to be a penal offence in a director to vote in the board for a dividend when there are no net profits on hand to pay it, no such fact is charged in this indictment.

The indictment does not say there were no net profits on hand June 30, 1876, when the dividend so-called was ordered. It says the amount of the dividend, $87,500, was June 30, 1876, greater by $87,500 than the *net profits* then on hand, *after deducting from said net profits the losses and bad debts existing at the time.* Certainly this is an admission that there were on hand at the time named an unknown amount of *net profits.* Whether as much as $87,500 is not stated; nor does it appear that the amount of net profits on hand was not greater than $87,500. The pleading is uncertain.

The pleader committed a palpable error in requiring the bad debts and losses to be deducted *from the net profits*, in order to find the amount liable to dividend.

What are net profits? Worcester (Dic.) says *net* means that which remains after the deduction of all charges and outlays, as "*net profits;*" all tare or tret or other deductions, as "*net weight.*" Webster (Dic.) says *net* means clear of all charges and deductions, as "*net profits.*" In 22 Wall 136, *St. John* vs. *Erie Railway Co.*, it is said "net earnings" means that which remains as "*net profits*" after deducting all charges and outlays.

What is the meaning of "net profits" as used in this statute? The statute itself expressly defines it. It is that portion of the gains out of which a dividend may be declared, and the provisions of the statute are so particular that there is no mistaking it. §5,199 says "The directors of any association may semi-annually declare a dividend of so much of the *net profits* of the association as they may deem expedient; but each association shall, before the declaration of a dividend, carry one-tenth of its *net profits* of the preceding half year to its surplus fund until the same shall amount to twenty per cent. of its capital stock."

Here is an express provision: (1.) That a dividend can only come out of the net profits. (2.) That if the surplus fund is not yet full 20 per cent. of the capital, nine-tenths only of the net profits can go to the dividend; but if the surplus fund is full the whole net profits, without any deduction, may go to dividend.

Therefore, losses and bad debts can not be deducted from the "*net profits*" contemplated by § 5199. The same provision, in different words, is found in §5204. It says "No association or any member thereof shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the forms of dividends or otherwise, any portion of its capital."

This is an explicit declaration that a dividend can only be

made out of *profits*. What profits? The next paragraph answers the question.

"If losses have been sustained by any such association equal to or exceeding its *undivided profits* then on hand, no dividend shall be made." That is, in order to find the *net profits* which is the subject of a dividend, you must substract the losses from the *undivided profits* (meaning gross profits.) But when you have done this and found the net profits, are you again to subtract losses and bad debts from these *net profits?* Observe that the word "losses" is broad enough to cover bad debts.

To make the matter, already plain enough, more certain, the draughtsman of the law added another paragraph, viz., "And no dividend shall ever be made * * * to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts." Deducting therefrom means deducting from its "undivided gross profits." Any other view is unreasonable, is in contradiction of the preceding clauses of the same section, and to section 5199. The word "therefrom" was not intended to apply to the words "net profits," but to the words undivided profits in the preceding paragraph of the same sentence.

The deduction can not be made from the ascertained net profit, because the very purpose of § 5204 is to find the net profits, and to limit to them the power to declare dividends.

When, according to the second paragraph of section 5204, the losses have been once deducted from the profits (gross), why should the *losses* and bad debts be again deducted? What is the object of such a deduction? What is to be done with the money? There is nothing in the act anywhere disposing of the amount thus supposed to be taken away from the stockholders. In the whole history of banking transactions of partnership ventures, there is nothing to lend a semblance of justice or sense to such a double deduction.

The National Banking Act, contains nothing new or unusual. It is a general and necessary rule with banks that

dividends be made out of net profits and not out of the capital. Expenses, outlays, bad debts, losses, all deductions, must come out of the *gross* profits, and in the nature of things the balance is net profits, and that is the only proper subject of a dividend.

This is what the National Banking Act intends to be done and no more. It has been said that the model of the National Banking Act was the New York Banking Act of December, 1827.

The provisions of the New York statute (see Cleveland, Banking Laws of New York, p. 5,) in respect to dividends are substantially those of the National Banking Act. In place of *net profits* the New York Act has "*surplus profits.*"

And it provides that to ascertain the surplus profits from which alone a dividend can be made, there must be deducted from the *actual profits* (meaning gross) all expenses, all interest owing by the company, all losses and bad debts, and that the residue is the sum liable to dividend. There never was a bank charter which required losses to be deducted to find net profits, and then required *losses and bad debts* to be deducted again to find what amount should be divided among stockholders. § 5,199 declares the net profits to be the subject of dividend, and that is conclusive, unless § 5,204 was intended to repeal 5,199 and common sense also.

There is no ambiguity on the face of the statute; and if there was, no construction can be tolerated which would uphold this double deduction. It is the duty of the Court to take all the provisions into account and carry out the intention of the act, regardless of the letter when the letter does not express the intention.

See 1 Kent Com., 462.

To come at the intention a whole clause may be rejected. (Page 463.) (See: Potter's Dwarris Con. & Stat.) "The letter is the body:" but the sense and reason is the soul of the statute. (Page 175.) Words may be transposed or

interposed—"*or*" may be expounded to mean "*and;*" "*if*" may be construed to mean "*when.*" (Page 175.) The structure of a sentence may be modified. (Page 200.) Grammatical sense is not to be followed when it would lead to inconsistency or absurdity. (Pages 207–208) It is necessary sometimes to put on a construction totally different from the literal clauses of an act. (Page 209.) If sensible matter be alleged, insensible matter following may be rejected. (Page 211.) The word "*preferred*" was stricken out and the word "*tried*" substituted. (Page 212.) Smith's Com., § 489.)

The manifest intention overrules the letter of the law. 53 Geo., 344 *George vs. The Board*, etc. 44 Mo. 283, *State vs. King*. 33 Mo , 385, *State vs. Richardson*. In 5 Mo., 91, *State vs. Beasly*, the word "*such*" was stricken out of the statute. In 48 Mo., 167, "*may*" was ruled to mean "*shall.*"

14 Mass., 92, *Whitney vs. Whitney*, the letter of the statute may be enlarged or restrained according to the intention. See 64 Mo., 112, *Proctor vs. H. & St. J. R. R.*, "any person" held to mean some persons only. See 5 Ind., 547, *Mayor, &c., vs. Weems.* 39 Ills., 96, *Noe vs. People.*

In 52 Pa. St., 391, *Com vs. Bridgwater*, the words "*any Borough*" construed to mean some particular boroughs. To effectuate the intention of the statute in this case the Court will reconstruct the whole of section 5204, if necessary, or strike out a word or words, or modify a clause or clauses before holding the clear intention of the statute shall be made null by the word "therefrom."

SECOND. THE FIRST AND THIRD COUNTS ARE BAD FOR NOT CHARGING INTENT TO DEFRAUD.

§ 5,209, after enumerating the several acts which it intends to punish, qualifies the character of those acts by

describing them as done, "*in either case*, with intent to injure and defraud the association, or any other company, body politic or corporate, or any individual person."

These words are omitted in the count, and the omission is fatal to the pleading. It is an admission that there was good faith, and no fraudulent intent.

In U. S. vs. Cruikshank, 92 U. S. Rep., 588, it was said a crime is made up of acts and intents; and these must be charged in the indictment.

It is a general rule of criminal pleading that the offence be alleged in the words of the statute. Wharton Am. Crim. Law, 5th ed.: "Where the words of the statute are descriptive of the offence, the indictment shall follow the language, and expressly charge the described offence on the defendant, or it will be defective." "It is necessary the defendant be brought within *all the material words of the statute*, and nothing can be taken by intentment" Wharton Am. Cr. Law, § 364.

The language of the statute in this case is express that in "either case" the act must be done "with intent to injure or defraud the association," etc.

How is it possible to consider such words in a statute immaterial? To hold them immaterial would change the meaning of the statute entirely.

An officer of the bank, it seems to us, might voluntarily (wilfully) do an act which would be a misapplication of funds, sincerely believing it was not. If then, such an act may be innocent, or may be with intent to injure or defraud, the words of the statute are material to point out the fraudulent act which the law intends to punish. It is the act, combined with the intent, that is punishable.

6 Otto, 365, U. S vs. Simmons.

It has been supposed that the case of the U. S. vs. Taintor is an authority for omitting the allegation of intent.

This is a mistake. The question in Taintor's case was one of evidence, not of pleading.

The pleading was right, the intent to injure and defraud was expressly charged, and the question was, whether the allegation of intent was proved.

The court decided that it was proved. The proof in the case was, that, being cashier of the bank, Taintor took the money *in his hands as such*, and used them in speculations "*on his own account*," and these facts were considered by the court proof of the alleged "intent to injure and defraud the bank." Taintor's case is an authority against the present indictment.

THIRD. THE OTHER COUNTS CHARGING INTENT TO DEFRAUD ARE NOT SUFFICIENT.

These counts say the defendants conspired, etc., with intent to defraud, etc , *in this* that there were no net profits on hand equal to the amount of the dividend *after deducting from the net profits on hand the losses and bad debts.*

According to these counts the fraud consisted in not deducting from the gross profits the losses and bad debts twice.

FOURTH. THE INDICTMENT IN CASE 410 IS BAD FOR ALL THE CAUSES ALLEGED AGAINST THE INDICTMENT IN CASE 409.

Hoar & Shepley
for Bailey
J. B. Henderson
Geo. H. Stuart } for Brelin

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SUPREME COURT U.S.
FILED
OCT 11 1882
JAMES H. McKENNEY, Clerk

IN THE

SUPREME COURT, OF UNITED STATES.

OCTOBER TERM, 1882.

THE UNITED STATES,

vs.

JAMES H. BRITTAIN, AND
BARTON BATES,
Defendants,

Statement and Brief for Defendant Bates.
by Glover AND Shepley.

IN THE

SUPREME COURT, OF UNITED STATES.

OCTOBER TERM, 1882.

THE UNITED STATES,

vs.

JAMES H. BRITTAIN, AND
BARTON BATES,
Defendants,

No.

Statement of Case No. 411, by Glover AND Shepley, for Defendant Bates.

The first count of the indictment in this case charges that the defendants on the 2nd day of April 1877, conspired combined confederated, and agreed among themselves and certain other persons to the jurors unknown, to wilfully mis-apply with intent to defraud the National Bank of the State of Missouri, and certain persons to the jurors unknown of a large sum of money belonging to said Association, to-wit: Two millions of dollars, by using and applying the same to the purchase in the name of said James H. Brittain, for the use of the Bank, from certain persons to the Jurors unknown of a large number, viz: 20,000 shares of the capital stock of the said Bank, which said purchase so to be made as aforesaid, was not to be made in order to prevent loss on any debts theretofore or there-

after to be contracted with said Bank, in good faith, and was not to be made for the purpose of reducing the capital stock of said Bank in accordance *with any vote theretofore* had of shareholders owning two-thirds of the capital stock of said Bank.

The count charges certain overt acts of purchase of shares of the stock from persons unknown.

The second count substantially like the first, except, that it charges no intent to defraud, and sets forth several overt acts of purchase of shares of stock by defendant Brittain, from known persons.

The defendants demurred to the indictment and on the hearing of the demurrer, the Judges were decided in opinion concerning the following questions?

1. Whether the second count sufficiently states an offence under sections 5209 and 5440.

2. Whether the allegations that the stock was to be purchased and was purchased for the use of the Bank vitiates the first count of the indictment.

3. Whether, in other respects said count sufficiently states an offence under sections 5209 and 5540, which questions were certified to this Court.

Assignment of errors by defendants Bates and Britton.

First. The said defendants Britton and Bates say that the Circuit Court erred in not sustaining the demurrer to the first count of said indictment.

Second. The Circuit Court erred in not sustaining the demurrer to the second count of said indictment.

Brief and Argument for the Defendant Bates by Glover & Shepley, his Attorneys.

We will consider the second count in this indictment first.

The second count avers that, April 2, 1877, James H. Britton was president, and Barton Bates director of said bank, and the two conspired together with other persons unknown, to *wilfully misapply* two millions of dollars, moneys of the bank, by using and applying the same to the purchase, in the name of Britton, *for the use of the bank*, twenty thousand shares of its capital stock. That the said purchase was not to be made, in order to prevent loss on any debt *theretofore* or *thereafter to be contracted* with said association in good faith, nor for the purpose of reducing the capital stock of said association, in accordance with any vote *theretofore had of* shareholders owning two-thirds of the capital stock of said association.

That afterward, said Britton paid to persons unknown, several sums of money belonging to the bank, in the purchase by him of certain shares of the stock of the bank, in order to effect the object of the conspiracy.

I.

THERE IS NO OFFENCE UNDER THE LAWS OF THE UNITED STATES CHARED IN SAID SECOND COURT.

The word "misapply" is legally descriptive of a form of embezzlement. It is never used to describe an unlawful taking of money or property. It is only applicable to a case in which the lawful possession of money or property has been entrusted to the hands of the misapplier.

Now, as there is no avertment in the count that the moneys mentioned had been so entrusted to the lawful possession of the defendants, there can be no such offence as embezzlement by "misapplication," and the words "wilfully misapply," as employed in the count, are without any sensible legal meaning. Standing in the connection they do in the count they are mere nulities.

See: Argument in cases No. 409 and 410,

II.

THE AVERMENT THAT BRITTON WAS PRESIDENT AND BATES DIRECTOR OF THE BANK, DOES NOT SIGNIFY THAT EITHER OF THEM HAD, AS SUCH, ANY LAWFUL POSSESSION OF ITS FUNDS.

The count is based upon the assumption that the averment that Britton was president and Bates was director of the bank, is substantially an averment that they had lawful possession of its funds, and stood charged, by authority of the bank, with certain specific duties touching the application; that is, that the defendants were in a condition to commit embezzlement in case they applied them contrary to these duties. Unless this position can be maintained, the count is a mere nullity. We have shown in our argument on the demurrer to No. 409 and 410, that neither the president nor the director as such had the slightest power to touch the funds of the bank. That having no right to apply the bank's funds, there is no case for misapplying. That if, in such a case, a president or director, or both together, take the moneys and carry them away, without authority from the board, the offence is not embezzlement —not misapplication—but something else. It may be trespass, larceny or robbery, according to the manner of the act and the intention, but it is not embezzlement or misapplication.

III

THE COUNT IS REPUGNANT AND CONTRADICTORY.

It charges in one place that defendants conspired to *wilfully misapply* the funds of the bank, and in another place that the same identical funds were invested *for the use* of the bank.

Criminal pleading must not be contradictory. It must be certain to every intent and without intendment to the contrary. There is a case in 2 Hawkins P. C,, chap. 25, p. 562, where the prisoner was charged with forging a writing

by which A. was bound to B. and C. On objection that the charge was repugnant, that it charged the writing was a forgery and was not a forgery, because it avered it was binding, the count was held bad.

See: 5 Wheat., 201, U. States vs. Bowers.
2 Mo., 226, State vs. Hendricks.
Conference R. 369, State vs. Hardwicks.
1 How (Miss.) 260, Serpentine vs. State.

See also: Alleyn, p. 50, Edgerton's case,—the indictment aimed to charge the defendant with aforcible entry.

It is said the defendant entered on Edgerton's land *peaceably* and *forcibly* disseized him. Indictment was held bad. There was on the face of the pleading a double intendment. It wore two faces.

The count now under consideration states in the positive that the moneys in question were paid to purchase shares of the stock *for the use of the bank;* that is for the *benefit and advantage of the bank.* There is no averment that this use was merely pretended by defendants. The purchase therefore is to be considered as for the *lawful and proper use* of the bank. This averment is repugnant and contradictory to the allegation that the funds of the bank were misapplied by the purchase of the shares. The case is precisely like that in Hawkins, where the writing was forged and yet was binding: and like that in Alleyn, where the entry was both peaceable and forcible. The pleading would be bad in a civil suit. Bliss Code, Pl., § 315.

It will be contended that the alleged misapplication explains the averment that the purchase was for the lawful use of the bank. But if construction is allowed, why should not the latter averment explain away the former? In criminal pleading, nothing is made out by intendment. If the doctrine of intendment was permissible in a criminal case, it is this: that a pleading which has on its face two intendments must be construed against the pleader.

1 How. 104, U. S. vs. Lynn.

But construction has no place in criminal pleading. If a criminal pleading in a material averment has to be construed, it is bad.

IV.

THE COUNT IS BAD BECAUSE IT IS NOT AVERRED THAT THERE WAS NO VOTE BY TWO-THIRDS OF THE SHAREHOLDERS.

§ 5,143 provides that the the bank may, by a vote of shareholders owning two-thirds of the capital stock, reduce its capital stock, and does not require this vote to be had before the directory agree upon such reduction.

It is reasonable to suppose a proposition to reduce capital stock would always be considered and discussed or agreed to by the directors, or some of them, before any other step was taken.

When the intention to reduce has been assented to by the directors, the next thing reasonably would be, action by the vote of the shareholders. That would come probably always after what the learned district attorney calls the conspiracy. But there is nothing in § 5,143 requiring it to be before the agreement of the directors, or of some of them, to reduce the stock.

Now, this count avers that on April 2, 1877, the defendants combined and agreed to purchase the shares without any vote of two-thirds *theretofore had;* that is to say that there was no vote prior to the alleged conspiracy.

It is not said there was no vote of two-thirds of the shareholders for reduction. It is not said there was *no such vote prior to the purchase of stock* It is not said there was no such vote on the 2nd of April, 1877. It is not said there was no such vote prior to the doing of any act to effect the object of the alleged conspiracy.

The count is therefore insufficient.

It may well be that defendants agreed to reduced the capital stock of the bank by extinguishing certain of its shares;

and that "*afterwards*" the two-thirds vote was had, approving it: and after all this the shares were purchased.

Certainly there is nothing in the count to the contrary.

V.

THE COURT IS BAD BECAUSE IT CONTAINS NO ALLEGATION OF INTENT TO INJURE AND DEFRAUD.

[See argument on demurrer to indictment in cases No. 409 and 410.

VI.

The first count of indictment No, 411, contains an averment of intent to defraud. This is its only difference from the second count. This averment intensifies the repugnancy. It says the shares were purchased for the benefit and advantage of the bank, and with intent to defraud the bank, which is contradictory. The indictment should have averred the shares were not purchased for the use of the bank. The pleader perhaps meant this, but did not say it.

Hoyle & Shepley
for Bates
W. S. Anderson for Butler
Geo. H. Shields